Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SIBEL EDMONDS,

Petitioner,

—v.—

DEPARTMENT OF JUSTICE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in affirming dismissal of a retaliatory termination case by an FBI whistleblower, based on the state secrets privilege, prior to any discovery or consideration of non-privileged evidence.

2. Whether the court of appeals violated the First Amendment when it *sua sponte* excluded the press and public from the argument of this case, without case-specific findings demonstrating the necessity of closure.

PARTIES TO THE PROCEEDINGS

The petitioner in this case is Sibel Edmonds. The respondents are the United States Department of Justice; the Federal Bureau of Investigation; and the following individuals sued in their official capacities: Alberto Gonzales, Attorney General of the United States; Robert S. Mueller, III, Director of the Federal Bureau of Investigation; Thomas Frields, Supervisory Agent in Charge of the Federal Bureau of Investigation's Washington Field Office; and George Stukenbroker, Chief of Security of the Federal Bureau of Investigation's Washington Field Office.

RULE 29.6 STATEMENT

In accordance with United States Supreme Court Rule 29.6, petitioner states that she has no parent companies or non-wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Sibel Edmonds, a former translator for the Federal Bureau of Investigation (FBI) who was terminated in retaliation for reporting serious security breaches and potential espionage within the FBI's translation unit, seeks review of the judgment of the United States Court of Appeals for the District of Columbia affirming the dismissal of her retaliatory termination case on the basis of the state secrets privilege. Petitioner also seeks review of the Court of Appeals' *sua sponte* exclusion of the press and the public from appellate argument.

OPINIONS BELOW

The order of the court of appeals is unreported. Appendix ("App.") 1a-2a. The opinion of the district court is reported at 323 F. Supp. 2d 65 (D.D.C. 2004). App. 5a-33a.

JURISDICTION

The court of appeals entered its judgment on May 6, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the court of appeals was invoked under 28 U.S.C. § 1291. The jurisdiction of the district court was invoked under 28 U.S.C. § 1331.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." The Fifth Amendment provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law." The pertinent provisions of the Privacy Act are reprinted in the Appendix. *See* App. 39a-46a.

STATEMENT OF THE CASE

A. Ms. Edmonds' Termination

Following the terrorist attacks of September 11, 2001, Sibel Edmonds was hired by the FBI as a contract linguist to perform translation services in the Bureau's Washington Field Office. Court of Appeals Joint Appendix ("C.A. App.") 38 (Compl. ¶¶ 10-12). To obtain the requisite security clearance, Ms. Edmonds was subjected to, and passed, a polygraph examination and a ten-year background investigation. C.A. App. 38 (Compl. ¶ 14).

Between December 2001 and March 2002, Ms. Edmonds reported a number of incidents to FBI management officials that pointed towards "serious breaches in the FBI security program and a breakdown in the quality of translations as a result of willful misconduct and gross incompetence." C.A. App. 39 (Compl. ¶ 15). Ms. Edmonds' reports of misconduct included allegations that numerous communications had been intentionally left untranslated or mistranslated, thereby jeopardizing intelligence and law enforcement investigations related to the September 11 attacks and other ongoing counterterrorism, counterintelligence, and law enforcement investigations. Ms. Edmonds also reported concerns of potential espionage within the translation unit. Specifically, she reported that a fellow employee who had been granted a security clearance had past and ongoing associations with one or more targets of an ongoing FBI investigation and was apparently leaking information to those targets; that the same employee had improperly instructed Ms. Edmonds and another employee not to listen to or translate certain FBI wiretaps concerning those targets; and that the employee in question had threatened the lives and safety of Ms. Edmonds and a member of her family who resided in a foreign country. Finally, Ms. Edmonds reported that FBI managers had failed to take corrective action in response to her concerns, but had

instead retaliated against her. C.A. App. 39-40 (Compl. ¶ 16).

Ms. Edmonds raised her allegations of security breaches and misconduct up the FBI chain of command without effect, finally reporting them to the FBI's Office of Professional Responsibility and to the United States Department of Justice's Office of Inspector General. C.A. App. 41 (Compl. ¶ 23). Two weeks later, on March 22, 2002, Ms. Edmonds was fired, escorted from the building, and informed that she "would never step foot in the FBI again." C.A. App. 41-42 (Compl. ¶ 24). On April 2, 2002, Ms. Edmonds was notified in writing that she had been "terminated completely for the Government's convenience." C.A. App. 42 (Compl. ¶ 25).

Ms. Edmonds' allegations of security breaches came to the attention of United States Senator Charles Grassley, who wrote to FBI Director Robert Mueller on May 8, 2002, expressing concern about Ms. Edmonds' reports of misconduct and security violations and about apparent retaliation by the FBI. C.A. App. 42 (Compl. ¶ 27). On June 17, 2002, the FBI held an unclassified briefing for the Senate Judiciary Committee members and staff regarding Edmonds' allegations, "some of which the FBI verified were not unfounded." C.A. App. 80. Thereafter, Senator Grassley, joined by Senator Patrick Leahy, wrote to Glenn Fine, Inspector General of the Department of Justice, describing the FBI's June 17 testimony and requesting that the Office of Inspector General (OIG) pursue Ms. Edmonds' allegations. C.A. App. 73-74. In particular, the Senators' letter reported that the FBI had confirmed the validity of Ms. Edmonds' allegations relating to her fellow employee's misconduct. The entire text of the letter was printed in the Congressional Record. 148 Cong. Rec. S5842 (June 20, 2002).

The FBI provided a second unclassified briefing to Judiciary Committee members and staff on July 9, 2002. C.A. App. 200-01. The FBI once again presented

information relating to Ms. Edmonds' allegations concerning misconduct and mismanagement in the FBI translation unit. Following the briefing, Senators Grassley and Leahy wrote several additional widely disseminated letters to FBI Director Mueller and to then-Attorney General John Ashcroft regarding Ms. Edmonds, including an August 13, 2002 letter to the Attorney General concerning the status of the investigation of Ms. Edmonds' allegations, C.A. App. 80-81, and an October 28, 2002, letter to Director Mueller suggesting an independent audit and review of the translation unit. C.A. App. 108-09.

Meanwhile, even as the substance of Ms. Edmonds' allegations was being largely corroborated by the FBI in briefings to Congress, press accounts quoted anonymous government officials who cast doubt on Ms. Edmonds' credibility in an apparent attempt to discredit her allegations. For example, on June 8, 2002, the *Associated Press* published an article quoting "Government officials, who spoke only on condition of anonymity," who stated that Ms. Edmonds' allegations had not been corroborated, that she herself was being investigated for security breaches, and that she had been fired for performance issues. C.A. App. 42-43 (Compl. ¶¶ 27-31), 59-60. The article further reported that "FBI officials said they believe the [translation] program is solid and secure even as they let the investigations move forward." C.A. App. 59. Similarly, a June 19, 2002 story in *The Washington Post* quoted anonymous government officials who stated that the "FBI fired" Ms. Edmonds because her "disruptiveness hurt her on-the-job performance" and she "had been found to have breached security." C.A. App. 68-71. The article included a defense of Ms. Edmonds from Senator Grassley, who stated that Ms. Edmonds had "made these allegations in good faith and even though the deck was stacked against her" and that the "FBI even admits to a number of her allegations . . . ." C.A. App. 69.

B. Proceedings Below

1. Filing of Suit and Invocation of the Privilege

Ms. Edmonds brought this suit against the Department of Justice, the FBI, and various high-level officials on July 22, 2002, alleging violations of the First Amendment, the Due Process clause of the Fifth Amendment, and the Privacy Act, arising from her retaliatory termination and from the government's subsequent unauthorized disclosures to the media. Rather than respond to the merits of Ms. Edmonds' claims, on October 18, 2002, Attorney General Ashcroft invoked the state secrets privilege and moved to dismiss the suit prior to discovery, asserting that "further disclosure of the information underlying this case, including the nature of the duties of plaintiff or the other contract translators at issue in this case reasonably could be expected to cause serious damage to the national security interests of the United States." C.A. App. 56 (Ashcroft Decl. ¶¶ 5-6). The Department of Justice thereafter moved successfully to stay all discovery pending the court's adjudication of the state secrets issue.

The Attorney General invoked the state secrets privilege a second time in an attempt to block Ms. Edmonds from being deposed in another case brought by families of those killed on September 11 against Saudi individuals and entities alleged to have financed al-Qaeda. *See Burnett v. Al Baraka Investment & Dev. Corp.*, Civ. Action No. 03-9848 (S.D.N.Y. filed Dec. 11, 2003). The government filed its motion to quash the deposition with the district judge in the present case, who then ordered the government to produce "any unclassified documents or other unclassified information in its possession that has been presented to the United States Senate or any other forum or individuals which is relevant to the substance of Sibel Edmonds' potential deposition." C.A. App. 216. In response, the government submitted additional *ex parte* and public declarations in

support of its invocation of the state secrets privilege, which the district court then considered in both cases. App. 6a, 27a, 32a.

The government then took the extraordinary step of moving to classify *retroactively* the information it had presented to the Senate Judiciary Committee. On May 13, 2004, the following email message was sent to staff of the Senate Judiciary Committee:

> The FBI would like to put all Judiciary Committee staffers on notice that it now considers some of the information contained in two Judiciary Committee briefings to be classified. Those briefings occurred on June 17, 2002, and July 9th, 2002, and concerned a woman named Sibel Edmonds, who worked as a translator for the FBI. *The decision to treat the information as classified from this point forward relates to civil litigation in which the FBI is seeking to quash certain information.* The FBI believes that certain public comments have put the information in a context that gives rise to a need to protect the information.
>
> Any staffer who attended those briefings, or who learns about those briefings, should be aware that the FBI now considers the information classified and should therefore avoid further dissemination. . . .

C.A. App. 200-01 (emph. added).

On May 20, 2004, Senator Grassley responded to the retroactive classification in comments to *The New York Times*, declaring that "[w]hat the F.B.I. is up to here is ludicrous," C.A. App. 178, and characterizing the classification order as being "as close to a gag order as you

can get."[1] An FBI official who spoke on the condition of anonymity disclosed that "the decision to classify the material was made by the Justice Department." C.A. App. 178-79. Attorney General Ashcroft corroborated that statement in testimony before the Senate Judiciary Committee on June 8, 2004, where he explained that the retroactive classification decision was "relate[d] to both a lawsuit which [was] underway and the national security interests of the United States."[2]

2. District Court Dismissal

On July 6, 2004, the district court dismissed Ms. Edmonds' case on state secrets grounds.[3] App. 5a-33a. The court first rejected Ms. Edmonds' contention that the government had not properly invoked the state secrets privilege, holding that Attorney General Ashcroft's declarations provided sufficient evidence that the Attorney General had personally considered the matter prior to his formal invocation, and that the declarations were sufficiently specific to support the propriety of the invocation. App.16a-24a. The court does not appear to have reviewed any particular documents the government claimed were privileged, but instead relied only on the government's characterization of privileged categories of information in its

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[1] Indeed, one of the retroactively classified documents was released to Ms. Edmonds in response to a FOIA request, and was marked "unclassified," well after the government's invocation of the privilege. C.A. App. 176, 184-85.

[2] *See DOJ Oversight: Counterterrorism & Other Topics: Hearing Before the Senate Judiciary Committee,* 108th Cong. (2004).

[3] The district court also granted in part the government's motion to quash Ms. Edmonds' deposition on state secrets grounds in *Burnett v. Al Baraka Investment & Dev. Corp.*, 323 F. Supp. 2d 82 (D.D.C. 2004).

classified, *ex parte* declarations. After upholding the government's invocation of the privilege, the court then considered whether dismissal of Ms. Edmonds' case was warranted. App. 24a. The court did not first allow Ms. Edmonds to conduct any non-privileged discovery or to submit any non-privileged evidence in support of her claims. The court ultimately dismissed the case, holding that Ms. Edmonds would be "unable to prove the prima facie elements of each of her claims without the disclosure of privileged information," and that defendants would be "unable to assert valid defenses to her claims without such disclosures." App. 27a. The court accepted the government's broad assertion that both the "nature of [Ms. Edmonds'] employment" and the "events surrounding her termination" constituted state secrets. App. 28a. Accordingly, the court held that it would be unable to "disentangle" state secrets from non-privileged evidence, and dismissed the case at the pleading stage.

Two weeks after the district court issued its opinion, FBI Director Mueller sent a letter to Senator Orrin Hatch in which he noted that the Department of Justice's Inspector General had "recently completed its classified report on the allegations of Sibel Edmonds" and had concluded that "Ms. Edmonds' allegations 'were at least a contributing factor in why the FBI terminated her services.'"[4] A few days later, the Department of Justice's Inspector General released an

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[4] Letter from FBI Director Mueller to Senator Hatch, dated July 21, 2004, at 1, at http://www.pogo.org/m/hsp/hsp-040721-Mueller.pdf; *see also* Eric Lichtblau, *Whistle-blowing Said to be Factor in an F.B.I. Firing*, N.Y. TIMES, July 28, 2004, at A1 ("[A] classified Justice Department investigation has concluded that a former F.B.I. translator at the center of a growing controversy was dismissed in part because she accused the bureau of ineptitude, and it found that the F.B.I. did not aggressively investigate her claims of espionage against a co-worker.").

unclassified executive summary of its audit of the translation services unit of the FBI.[5] In further support of Ms. Edmonds' allegations, the audit revealed a serious backlog of more than 370,000 hours of untranslated counterintelligence tapes and more than 119,000 hours of untranslated counterterrorism tapes recorded after September 11, and disclosed ongoing problems with inaccurate translations.[6]

3. The Inspector General's Report on Ms. Edmonds' Allegations

Ms. Edmonds timely appealed the district court's dismissal to the United States Court of Appeals for the District of Columbia. One day after Ms. Edmonds filed her opening appellate brief, the Justice Department released to the public an unclassified summary of its Inspector General's report on Ms. Edmonds' allegations.[7] The Inspector General concluded that the FBI had retaliated against Ms. Edmonds

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[5] *The Federal Bureau of Investigation's Foreign Language Program -- Translation of Counterterrorism and Counterintelligence Foreign Language Material*, Rep. No. 04-25, July 2004, Office of the Inspector General, at http://www.usdoj.gov/oig/reports/FBI/a0425/final.pdf.

[6] Indeed, in a recently released follow-up audit of the FBI translation program, the Inspector General found that those backlogs have increased to 707,742 hours of unreviewed counterintelligence and counterterrorism audio. *Federal Bureau of Investigation's Foreign Language Translation Program Follow-up*, Rep. No. 05-33, July 2005, Office of Inspector General at pg. v, at http://www.usdoj.gov/oig/reports/FBI/a0533/final.pdf).

[7] *A Review of the FBI's Actions in Connection with Allegations Raised by Contract Linguist Sibel Edmonds*, January 2005; Unclassified Summary, Office of Inspector General, at http://www.usdoj.gov/oig/special/0501/final.pdf (hereinafter "IG Report").

for reporting serious security breaches, stating that "many of her allegations were supported, that the FBI did not take them seriously enough, and that her allegations were, in fact, *the most significant factor in the FBI's decision to terminate her services.*" IG Report at 31 (emphasis added).

The Inspector General's findings corroborate Ms. Edmonds' version of the events surrounding her termination. The Inspector General found that Ms. Edmonds raised serious allegations of espionage that were "supported by either documentary evidence or witnesses other than Edmonds," and that the FBI's investigation of those allegations was "significantly flawed." IG Report at 10, 15. The Inspector General emphasized that, "as demonstrated by the espionage of former FBI Agent Robert Hansen, the FBI must take seriously allegations suggesting security breaches, even if the evidence is not clear-cut." *Id.* at 12 n.13.

The Inspector General found that "rather than investigate Edmonds' allegations vigorously and thoroughly, the FBI concluded that she was a disruption and terminated her contract." IG Report at 11. Soon after Ms. Edmonds began reporting her concerns, a high level manager began inquiring about the FBI's options with respect to terminating contracts with linguists. *Id.* at 21. By March 20, 2002, Ms. Edmonds' supervisor officially recommended that her contract be terminated, and repeatedly mentioned her reports of misconduct as a reason for the decision. *Id.* Ms. Edmonds was terminated two days later. Shortly thereafter, additional allegations of security violations were lodged against Ms. Edmonds. However, an internal analyst noted in a memorandum described by the Inspector General that Ms. Edmonds was not fired for security reasons and that her clearance had not been revoked. *Id.* at 23.

On the basis of this evidence, employing an analysis almost identical to a First Amendment retaliation analysis,[8] the Inspector General found that Ms. Edmonds' whistleblower activity was "the most significant factor in the FBI's decision to terminate her services." IG Report at 31; *see also id.* at 35. The Inspector General also found that the government could not establish a valid defense to Ms. Edmonds' retaliation claim. The Inspector General deemed entirely unpersuasive the FBI's claim that it had legitimate reasons for firing Ms. Edmonds, and its claim that it would have fired her notwithstanding her whistleblower activity. The Inspector General expressly determined that the FBI could not show "that at the time the decision was made it would have terminated Edmonds' contract absent her disclosures." IG Report at 30. Rather, the Inspector General found that Ms. Edmonds was not fired because the FBI did not need her services, nor because she was a security threat, but because she was perceived as having a "disruptive effect" due to her whistleblower activity. *Id.* at 31-32. The Inspector General expressed its further concern that "[b]y

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[8] *See, e.g., Connick v. Myers*, 461 U.S. 138 (1983). The Inspector General considered whether Ms. Edmonds had been retaliated against under the standards of the FBI whistleblower regulations. Much like a First Amendment retaliation claim, the whistleblower retaliation inquiry asks whether an employee's disclosure is "protected," whether the employee "reasonably believe[d] the disclosure evidence[d]" some kind of violation, mismanagement, abuse of authority or danger to the public, and whether the "disclosure was a contributing factor" in the termination decision. IG Report at 30. If a whistleblower establishes those elements, the burden shifts to the FBI to show that "it would have taken the personnel action against the complainant in the absence of [the] protected disclosure." *Id.*

terminating Edmonds' services, in large part because of her allegations of misconduct, the FBI's actions also may have the effect of discouraging others from raising concerns." *Id.* at 32.

Approximately one month after the summary of the Inspector General's Report was released, while the case was still pending before the court of appeals, the Justice Department conceded that information about Ms. Edmonds' allegations that it had presented to the Senate Judiciary Committee was not in fact classified, as the government had previously insisted. *See* R. Jeffrey Smith, *Access to Memos is Affirmed*, WASH. POST, Feb. 23, 2005, at A17 (reporting that the "Justice Department has backed away from a court battle over its authority to classify and restrict the discussion of information [related to Sibel Edmonds] it has already released.").[9]

4. The Court of Appeals' Closure of the Courtroom and the Affirmance

Oral argument before the court of appeals was scheduled for April 21, 2005. On April 20, the court's clerk informed counsel by telephone that the Court had decided to exclude the press and public from the courtroom. The Court issued no order of closure, and made no case-specific findings

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[9] The lawfulness of the government's retroactive classification of this information had been the subject of a separate lawsuit. *Project on Government Oversight v. Ashcroft*, No. 1:04-CV-01032-JDB (D.D.C. filed 6/23/04). On the eve of a hearing in that case, the government released the information on the ground that "[t]he FBI has determined that these letters are releasable in full, pursuant to the [FOIA]." *See* Letter of February 18, 2005, from Vesper Mei, DOJ Trial Attorney to Michael Kirkpatrick, counsel for Project on Government Oversight, at http://www.pogo.org/m/gp/gp-02182005-JusticeDeptLetter.pdf.

demonstrating the need for closure. In fact, the government had previously notified the court that it was "prepared to argue this case publicly, in an open courtroom." App. 47a (Letter of April 12, 2005, from H. Thomas Byron III, counsel for appellees, to Clerk of Court). Later that day, Ms. Edmonds and several *amici* filed motions asking the court to hold argument in public. App. 3a (Order of April 21, 2005). Additionally, several media organizations, including The Washington Post, The New York Times, The Los Angeles Times, the Associated Press, Reuters America, and Cable News Network (CNN) moved to intervene in the case for the purpose of moving to open oral argument to the public. App. 3a. The government did not oppose these motions. Nevertheless, the next morning, the Court granted the media's motion to intervene but denied all motions to open the courtroom, without opinion.

The oral argument ultimately proceeded in two phases. First, the Court questioned both Ms. Edmonds' counsel and the government. No privileged or sensitive information was discussed. The Court then asked Ms. Edmonds and her counsel to leave the courtroom so that it could continue to question the government in private. Before leaving the courtroom, counsel for Ms. Edmonds asked the court to release a transcript of the portion of the argument that had just concluded. The government stated that it did not oppose that request, and the court granted it. The transcript was released soon thereafter.

Fifteen days later, the court of appeals affirmed the district court's dismissal of Ms. Edmonds' suit, without opinion. In an unpublished order, the court of appeals held that "the order of the district court dismissing Edmonds' claims is hereby affirmed for the reasons given in that court's opinion, 323 F. Supp. 2d 65 (D.D.C. 2004)." App. 1a-2a (Order of May 6, 2005).

REASONS FOR GRANTING THE PETITION

The Court should grant review to provide guidance to the lower courts about the proper scope and application of the state secrets privilege, and to prevent further misuse of the privilege to dismiss lawsuits at the pleading stage. Last Term, in *Tenet v. Doe*, the Court considered the so-called *Totten* rule, which allows outright dismissal at the pleading stage of cases involving unacknowledged espionage agreements. It contrasted the *Totten* rule with the state secrets privilege, which may be invoked to prevent disclosure of specific evidence during discovery. Because the state secrets privilege was discussed in *Tenet* only to contrast it with the *Totten* rule, the *Tenet* Court had no occasion to clarify the proper scope and use of the state secrets privilege. This case presents that occasion. Confusion about the state secrets privilege continues to create conflicts among the decisions of the lower courts. Over the past several decades, some courts have dangerously expanded the privilege far beyond the narrow bounds outlined by this Court in *United States v. Reynolds*. Failing to recognize that the state secrets privilege is merely a discovery shield, these courts have allowed the government to use the privilege as a sword to justify premature dismissal of legitimate lawsuits. Ms. Edmonds' case is the most recent, and most extreme, example. The lower court's dismissal of Ms. Edmonds' straightforward retaliatory termination case at the pleading stage illustrates the harms that result from ongoing confusion about the state secrets privilege.

In addition, the Court should grant review to clarify that the press and public may not be excluded from appellate arguments in civil cases in the absence of specific findings demonstrating the need for closure.

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY THE PROPER SCOPE AND APPLICATION OF THE STATE SECRETS PRIVILEGE.

A. Lower Courts Have Repeatedly Confused the State Secrets Privilege with the *Totten* Rule.

This Court outlined the proper use of the state secrets privilege more than fifty years ago in *United States v. Reynolds*, 345 U.S. 1 (1953) and has not directly considered the doctrine since then. In *Reynolds*, the family members of three civilians who died in the crash of a military plane in Georgia sued for damages. In response to a discovery request for the flight accident report, the government asserted the state secrets privilege, arguing that the report contained information about secret military equipment that was being tested aboard the aircraft during the fatal flight. 345 U.S. at 3-4. Noting that the government's privilege to resist discovery of "military and state secrets" was "not to be lightly invoked," the Court required "a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Id.* at 7-8. The greater the necessity for the allegedly privileged information in preserving the case, the more a "court should probe in satisfying itself that the occasion for invoking the privilege is appropriate." *Id.* at 11. Where the necessity for the information is "strong . . . the claim of privilege should not be lightly accepted." *Id.* The *Reynolds* Court cautioned that "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Id.* at 9-10.

The *Reynolds* Court then upheld the claim of privilege over the accident report, *but did not dismiss the suit.* Rather, it remanded the case for further proceedings, explaining that:

> There is nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident. Therefore, it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets. Respondents were given a reasonable opportunity to do just that, when petitioner formally offered to make the surviving crew members available for examination. We think that offer should have been accepted.

345 U.S. at 11. Upon remand, plaintiff's counsel deposed the surviving crew members, and the case was ultimately settled.[10] Under *Reynolds*, the state secrets privilege is an evidentiary privilege that may be invoked to shield legitimately sensitive evidence from discovery, but not to

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[10] Newly disclosed facts about the *Reynolds* litigation confirm the need for the Court to review the state secrets privilege. The accident report at issue in *Reynolds* was recently declassified, and in fact contained no details whatsoever about secret military equipment. *See Herring v. United States*, 2004 WL 2040272 at *8 (E.D. Pa. Sept. 10, 2004) (noting that the accident report "does not... refer to any newly developed electronic devices or secret electronic equipment"). Apparently the government's true motivation in asserting the state secrets privilege was not to protect military secrets but rather to cover up its own negligence. *See id.* (the accident report revealed that "engine failure caused the crash" and that "had the plane complied with the technical orders . . . the accident might have been avoided"); *see also* Barry Siegel, *The Secret of the B-29*, L.A. TIMES, Apr. 18, 2004, at A1 (reporting on the recently unclassified accident report and the *Reynolds* litigation).

justify dismissal of an entire case at the pleading stage.[11]

The Court articulated a related but distinct doctrine in an even older case, *Totten v. United States*, 92 U.S. 105 (1875). In *Totten*, the Court dismissed at the pleading stage an action to enforce an alleged contract to conduct espionage because the government could not confirm or deny the existence of the contract. The *Totten* rule has repeatedly been confused with the state secrets privilege in the lower courts.

Last term in *Tenet v. Doe*, the Court considered the *Totten* rule, which is appropriately invoked to bar judicial review in cases "where success depends upon the existence of [a] secret espionage relationship with the government," 125 S. Ct. 1230, 1236 (2005), or where the government cannot openly acknowledge, i.e., "neither admit or deny [a] fact that [is] central to the suit." *Id.* at 1237 (internal quotation marks omitted). This Court stated that *Totten* is a "unique and categorical bar – a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry." *Id.* at 1235 n.4. The *Totten* rule thus requires a case to "be dismissed on the pleadings without ever reaching the question of evidence." *Id.* at 1237.

The Court distinguished *Totten*'s categorical bar and the evidentiary state secrets privilege by emphasizing the "obvious difference" between a contract action initiated by an

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[11] In recognizing the state secrets privilege, the *Reynolds* Court relied on a number of prior cases in which the government had asserted a privilege during discovery or at trial over discrete pieces of evidence that if disclosed would reveal specific military secrets. *See, e.g., Bank Line v. United States*, 163 F.2d 133 (2d Cir. 1947); *Cresmer v. United States*, 9 F.R.D. 203 (E.D.N.Y. 1949); *Pollen v. Ford Instrument Co.*, 26 F. Supp. 583 (E.D.N.Y. 1939); *Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 F. 353 (E.D. Pa. 1912).

unacknowledged covert spy, and an employment discrimination action such as *Webster v. Doe*, 486 U.S. 592 (1988), brought by an "acknowledged (though covert)" employee of the CIA. *Id.* *"Totten's* core concern [is] implicated" only in the first instance. *Id.* In contrast, employment cases like *Webster* are "regularly entertain[ed]" by the courts. *Id.* **The Court went on to explain that "*Reynolds* . . . cannot plausibly be read to have replaced the categorical *Totten* bar with the balancing of the state secrets evidentiary privilege . . . The state secrets privilege and the more frequent use of *in camera* judicial proceedings simply cannot provide the absolute protection we found necessary in enunciating the Totten rule."** *Id.* **Though the Court** clarified and upheld the *Totten* rule in *Tenet,* it did not clarify the proper scope and use of the evidentiary state secrets privilege.

The Court should accept review in the present case to resolve conflicting decisions in the lower courts on at least four related issues regarding the state secrets privilege. First, because of confusion about the distinction between the state secrets privilege and the *Totten* rule, courts have disagreed about whether the state secrets privilege ever justifies dismissal at the pleading stage. Some courts have improperly cited the state secrets privilege to dismiss at the pleading stage lawsuits involving central facts that the government could neither confirm nor deny; those courts should have relied instead on the *Totten* rule. *See, e.g., Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 547-48 (2d Cir. 1994) (wrongful death claim could not be resolved without confirming specific details about military weapons systems and "the rules of engagement" under which a Navy vessel operated); *Bareford v. General Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992) (same).

Other courts, like the lower courts in this case, have improperly dismissed cases at the pleading stage on state secrets grounds that could have proceeded because they did

not involve central facts the government could neither confirm nor deny. *See, e.g., Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004) (upholding pre-discovery dismissal on the basis of the state secrets privilege in a religious discrimination case); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (*en banc*) (dismissing contract suit between defense contractors at the pleading stage because any trial on the matter would "inevitably" reveal state secrets); *Black v. United States*, 62 F.3d 1115, 1119 (8th Cir. 1995) (affirming pre-discovery dismissal of a Fourth Amendment suit because of the risk that state secrets might be disclosed).

Still other courts have properly refused to dismiss a suit prematurely on the basis of the state secrets privilege before discovery. *See, e.g., In re United States*, 872 F.2d 472, 478-79 (D.C. Cir. 1989) (rejecting premature and categorical invocation of the privilege to dismiss a Federal Tort Claims Act case); *DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327, 334-35 (4th Cir. 2001) (upholding claim of privilege but rejecting premature dismissal of a trade secret misappropriation suit and remanding for further discovery); *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356, 1364 (Fed. Cir. 2001) (reversing premature dismissal of a contract suit on the basis of the privilege so that plaintiff could engage in further discovery to support claim with non-privileged evidence); *Spock v. United States*, 464 F. Supp. 510, 519 (S.D.N.Y. 1978) (rejecting pre-discovery motion to dismiss a Federal Tort Claims Act suit on state secrets grounds as premature).

The second category of confusion in state secrets cases concerns whether to allow further non-privileged discovery once the state secrets privilege is invoked, and when the privilege may ultimately require dismissal. Some courts have improperly dismissed a suit after the privilege is invoked without first allowing non-privileged discovery, or explicitly considering whether the parties could litigate the case without

the privileged evidence. *See, e.g., Bowles v. United States,* 950 F.2d 154, 156 (4th Cir. 1991) (dismissing Federal Tort Claims Act suit); *Farnsworth Cannon,* 635 F.2d at 281 (dismissing defense contractors suit). Some courts have allowed some non-privileged discovery, but have then improperly failed to consider non-privileged evidence before dismissing. *Fitzgerald v. Penthouse Internat'l Ltd.*, 776 F.2d 1236, 1241, 1244 (4th Cir. 1985) (dismissing libel suit on the eve of trial without analyzing non-privileged evidence); *Kasza v. Browner,* 133 F.3d 1159, 1170 (9th Cir. 1998) (dismissing a suit concerning hazardous materials at an Air Force facility without analyzing non-privileged evidence); *see also Tilden v. Tenet*, 140 F. Supp. 2d 623, 627 (E.D. Va. 2000) (dismissing gender discrimination claim against the CIA without analyzing non-privileged evidence). . Some courts wrongly halt non-privileged discovery once the privilege is invoked, but permit the plaintiff to submit non-privileged evidence before deciding whether dismissal is necessary. *See, e.g., Molerio v. FBI*, 749 F.2d 815, 822 (D.C. Cir. 1984) (halting discovery but terminating employment lawsuit only after evaluating plaintiffs' non-privileged evidence).

Still other courts properly follow *Reynolds* by allowing further non-privileged discovery after invocation of the privilege, and dismissing only if the privileged evidence is necessary for plaintiff to prove a *prima facie* case or for defendant to assert a valid defense. *See, e.g., Ellsberg v. Mitchell*, 709 F.2d 51, 64 n.55 (D.C. Cir. 1983) (reversing dismissal of a constitutional tort action and remanding where the district court "did not even consider whether the plaintiffs were capable of making out a prima facie case without the privileged information."); *Clift v. United States,* 597 F.2d 826, 830 (2d Cir. 1987) (refusing to dismiss an Invention Secrecy Act suit on the basis of the state secrets privilege because plaintiff could produce non-privileged evidence); *McDonnell Douglas Corp. v. United States,* 323 F.3d 1006,

1021 (Fed. Cir. 2003) (dismissing defense contractor suit only after discovery and determination that the claims could not be proved through non-privileged evidence); *see also Heine v. Raus*, 399 F.2d 785, 791 (4th Cir. 1968) (upholding claim of privilege in a defamation suit, but remanding for further discovery of non-privileged evidence); *Monarch Assurance P.L.C.*, 244 F.3d at 1364 (upholding claim of privilege in a contract suit, but remanding for further discover of non-privileged evidence).

Third, the lower courts are in conflict over whether a judge is obligated to examine the allegedly privileged material before dismissing a case due to the privilege. Some courts have improperly dismissed suits without examining the allegedly privileged evidence *in camera*. *See, e.g., Black*, 62 F.3d at 1119 (examining only government declarations); *Kasza*, 133 F.3d at 1170 (same). Other courts have properly examined the allegedly privileged material before dismissing a case on the basis of the privilege. *See, e.g., Ellsberg*, 709 F.2d at 59 n.37 (when litigant must lose if privilege claim is upheld, "careful *in camera* examination of the material is not only appropriate, but obligatory"); *ACLU v. Brown*, 619 F.2d 1170, 1173 (7th Cir. 1980) (stating that "a party's showing of need often compels the . . . court to conduct an in camera review of the documents allegedly covered by the privilege in order to determine whether the records are properly classified 'secret' by the government").

Fourth, the lower courts have no uniform practice of considering alternatives before dismissing a suit on the basis of the state secrets privilege. Some courts have improperly dismissed cases on the basis of the privilege without considering alternatives. *See, e.g., Farnsworth Cannon*, 635 F.2d at 281; *Tenenbaum*, 372 F.3d at 777. Other courts have properly refused to dismiss cases on the basis of the privilege where certain mechanisms to protect sensitive information would enable the case to proceed. *See, e.g., Halpern v. United States*, 258 F.2d 36, 41 (2d Cir. 1958) (refusing to

dismiss Invention Secrecy Act suit because the case could be tried *in camera*); *In re United States*, 872 F.2d at 478 (discussing bench trials, protective orders, seals and other mechanisms that may be employed to protect sensitive information); *see also Fitzgerald*, 776 F.2d at 1244 ("Only when no amount of effort and care on the part of the court and the parties will safeguard privileged material is dismissal [on state secrets grounds] warranted.").

The need for this Court to clarify the state secrets privilege is urgent because the government's use of the privilege is on the rise. *See* William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 86, 101-02, 107 (Spring 2005). When this Court last addressed the privilege, there were but a handful of lower courts that had considered the privilege. *Reynolds*, 345 U.S. at 7 n.11. A recent study reports that between this Court's decision in *Reynolds* and 1976, there were only four reported cases in which the government invoked the privilege. Weaver & Pallitto at 101. From 1977 to 2001, the number of reported cases concerning the privilege rose to fifty-one. *Id.* And in the first term of the present Administration, the government invoked the privilege in at least eight cases. *Id.* at 109, n.88 (reporting seven cases); *see also* Bill Conroy, *DEA Whistleblower Exposes CIA's "War of Pretense,"* ONLINE JOURNAL, Sept. 15, 2004, at http://www.online journal.com/Special_Reports/091504Conroy/091504conroy.html (reporting that government had successfully invoked the state secrets privilege in a case brought by a former Drug Enforcement Agency employee). Since Ms. Edmonds' case was dismissed, the government also invoked the privilege to dismiss at the outset an individual's claim that he was illegally "rendered" by the United States to Syria and subsequently tortured. *See Arar v. Ashcroft*, No. 04-CV-0249-DGT (E.D.N.Y filed Jan. 22, 2004). Because the state secrets privilege may force a private citizen to sacrifice a vital constitutional right for collective security, the

government's power to invoke it should be tightly constrained, controlled by clearly-defined rules, and closely monitored by the judiciary. The Court should grant review to establish clear guidelines regarding the proper scope and use of the state secrets privilege.

B. Ms. Edmonds' Case Illustrates the Harms that Result from Ongoing Confusion about the State Secrets Privilege.

This case illustrates the harms that result from ongoing confusion over the proper use of the state secrets privilege. The lower courts mistakenly treated Ms. Edmonds' case as a *Totten* case. While not expressly relying on *Totten* and its progeny, the district court dismissed the case at the pleading stage by reasoning that "the nature of the plaintiff's employment" and the "events surrounding her termination" are state secrets. App. 28a. Because Ms. Edmonds' case does not involve an unacknowledged secret relationship with the government or facts that can be neither confirmed or denied, it is clearly not controlled by *Totten*. *See Tenet*, 125 S. Ct. at 1236; *see also Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 146 (1981). Ms. Edmonds, an FBI contract translator with a security clearance, was fired in retaliation for speaking out about serious security breaches. As this Court made clear in *Webster v. Doe*, and recently reaffirmed in *Tenet*, employment litigation against the CIA (and *a fortiori* the FBI) is routinely considered by the courts. *Tenet*, 125 S. Ct. at 1237; *Webster*, 486 U.S. at 604.

The nature of Edmonds' job, moreover, is not even a state secret, let alone a fact that can be neither confirmed nor denied under *Totten*. FBI agents and translators are law enforcement personnel, not covert and unacknowledged government agents. In stark contrast to covert spies, the duties of FBI contract linguists are public knowledge and have been widely disclosed to the public. *See e.g.*, C.A. App.

59-60; IG Report at 3-7. The notion that all of the events surrounding Ms. Edmonds' termination are state secrets is equally implausible. A great deal of information about her termination is already public – and much of it was disclosed by the government itself. *See, e.g.*, C.A. App. 83-85, 108-09, 200-01. The Inspector General Report contains a tremendous amount of detail about the structure of the translation unit, the FBI response to security breaches, and the substance of Ms. Edmonds' allegations. IG Report at 3-7. The events surrounding Ms. Edmonds' termination simply cannot be considered state secrets when information about them has been so widely distributed. *See Snepp v. United States*, 444 U.S. 507, 511-512 (1980) (suggesting government has no interest, and lacks authority, to suppress national security information already in the public domain).

The lower courts' confusion over the state secrets privilege also led them to dismiss Ms. Edmonds' claims prior to discovery and the consideration of non-privileged evidence. Even at this early stage of the litigation, the available evidence strongly suggests that this case could be decided without relying on state secrets. The Inspector General's report would be admissible to support Ms. Edmonds' core First Amendment claim and negate the government's defenses.[12] Ms. Edmonds could also rely on information provided by the FBI in unclassified briefings to Congress. Furthermore, Ms. Edmonds could bolster her case by conducting non-privileged discovery. For example, the Inspector General's report identifies a range of non-

[12] Fed. R. Evid. 803(8)(C) provides that "Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth...in civil actions... factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness," are not "excluded by the hearsay rule."

privileged material from FBI emails, reports, and memoranda.[13] In addition, because the government has publicly admitted to a number of Ms. Edmonds' allegations, it may have no basis for denying certain allegations in her Complaint.

Finally, Ms. Edmonds' case illustrates how improper use of the state secrets privilege can threaten rather than protect national security. Ms. Edmonds raised serious allegations about espionage within the FBI unit responsible for translating counterterrorism wiretaps. IG Report at 34 (noting that Ms. Edmonds' allegations "raise serious concerns that, if true, could potentially have extremely damaging consequences for the FBI," and remarking on the "need for FBI vigilance about security issues"). Since the attacks of September 11, "there has been a surge of national security whistleblowers whose disclosures are warnings so that tragedy will not recur." Testimony of Thomas Devine, Government Accountability Project, Senate Governmental Affairs Comm. on S.1358, Nov. 12, 2003, at 9, at http://hsgac.senate.gov/_files/111203devine.pdf. If the state

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[13] *See, e.g.*, IG Report at 15, n.15 (quoting email written by the Language Supervisor); *id.* at 16 (quoting an email written by the Language Administration and Acquisition Unit); *id.* (quoting an Electronic Communication written by the Language Supervisor concerning Edmonds); *id.* at 17 (quoting testimony of FBI manager); *id.* (quoting Security Officer's request for polygraph examinations); *id.* at 20 (quoting what appears to be testimony of FBI manager); *id.* at 21 (quoting an Electronic Communication recommending Ms. Edmonds' termination, which included reference to the impression that Ms. Edmonds was using her whistleblower status as a "club" against her supervisors); *id.* (quoting final Electronic Communication recommending termination).

secrets privilege can be invoked to bar litigation by employees working in classified environments, then the government may retaliate with impunity against other whistleblowers who disclose national security blunders. As the Inspector General advised, such employees should be encouraged, rather than deterred, from raising their concerns. IG Report at 32. The Court should accept review to ensure that the state secrets privilege is not used as a tool to silence employees who risk their careers to protect the nation.

II. THE COURT SHOULD GRANT REVIEW TO CONSIDER THE COURT OF APPEALS' *SUA SPONTE* EXCLUSION OF THE PRESS AND PUBLIC FROM THE COURTROOM.

The court of appeals' decision to exclude the press and public from the courtroom during appellate argument, made at the eleventh hour without any findings as to the necessity of closure and without any request by the government to close proceedings, provides another basis for this Court's review. Indeed, the record in this case presents the opportunity, and demonstrates the need, for this Court to clarify that the First Amendment right of access to judicial proceedings extends to civil cases and to appellate arguments.

In the landmark case of *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980), this Court first held, in the context of criminal trials, that the First Amendment guarantees to the press and public the right of access to judicial proceedings. As this Court explained: "Free speech carries with it some freedom to listen . . . [T]he First Amendment guarantees of freedom and press, standing alone, prohibit government from summarily closing courtroom doors." 448 U.S. at 576. In particular, when "the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest,

and is narrowly tailored to serve that interest." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982). Thus, before a proceeding may be closed to the press and public, the court must make "specific, on record findings . . . demonstrating that closure is essential to preserve higher values and is narrowly tailored to preserve that interest." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (citations omitted).

Other circuits have recognized that the rationale for ensuring public access to criminal trials extends to civil and appellate proceedings. For example, in *In re Grand Jury Proceedings*, 983 F.2d 74 (7th Cir. 1992), the Seventh Circuit denied motions to seal appellate arguments in two cases, one involving grand jury material and the other involving medical records. Judge Easterbrook explained:

> What happens in the halls of government is presumptively open to public scrutiny. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat; this requires rigorous justification.

983 F.2d at 75, *see also Doe v. United States*, 253 F.3d 256, 262 (6th Cir. 2001) (citations omitted) (denying government motion to close appellate argument in case involving subpoena in ongoing criminal investigation). The requirement of public appellate argument does not evaporate because an appeal involves national security information. When the United States asked this Court to close just *part* of the oral argument in the Pentagon Papers case – a case that involved classified information of the greatest sensitivity – the motion was denied. *New York Times Co. v. United States*, 403 U.S.

944 (1971). Likewise, in an appeal in the ongoing prosecution of Zacarias Moussaoui, an alleged conspirator in the September 11 terrorist plot, the Fourth Circuit soundly rejected the government's argument that the entire appellate argument be held *in camera*:

> There can be no question that the First Amendment guarantees a right of access by the public to oral arguments in the appellate proceedings of this court. Such hearings have historically been open to the public, and the very considerations that counsel in favor of openness of criminal trial support a similar degree of openness in appellate proceedings.

United States v. Moussaoui, 65 Fed. Appx. 881, 890 (4th Cir. 2003).[14]

In contrast, the court of appeals here simply issued a one-line order summarily denying the motions of Ms. Edmonds and a media consortium to open the argument to the public. That action was all the more remarkable because the government made no motion to exclude the public from the courtroom, and indeed did not file any portion of its brief under seal. Moreover, neither Ms. Edmonds nor her counsel had security clearances, thus guaranteeing that no classified information could be mentioned during the argument.

The pointlessness of the court's closure order demonstrates the need for consistent enforcement of this Court's First Amendment holdings. While there can be no doubt that the protection of state secrets from disclosure is a compelling government interest, there was absolutely no connection between that interest and the court's actions in

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[14] A portion of the appellate argument in *Moussaoui* was closed, following a determination by the court that sensitive national security information might be disclosed.

this case. Assuming that security considerations were the motivating factor behind the court's closure order, the order was either fatally over- or under-inclusive. If, as the government itself plainly believed, there was no need to exclude anyone from the courtroom, then the court's order was unjustified and excessive. If, on the other hand, the court deemed it likely that the argument would involve a discussed of the alleged state secrets themselves, then Ms. Edmonds' uncleared counsel should have been excluded along with the press and public. Either way, the court's actions were the very antithesis of narrow tailoring and demonstrate the pressing need for this Court's guidance.

Finally, in a time of increasing government demands for secrecy, it is critical that the public retain confidence in the integrity of judicial proceedings. Cases involving state secrets will always pose special challenges to the adversarial process and to principles of open government. Especially when the scales are tilted against a private litigant through deprivation of key evidence or even the elimination of an otherwise legitimate claim, it is imperative to preserve the presumption of openness. Just as the privilege itself should "not . . . be lightly invoked," *Reynolds*, 345 U.S. at 7, the constitutional principle of openness should not be lightly discarded. It is no accident that the closure of the courtroom in this case generated as much attention and controversy as the profoundly serious allegations at the heart of this case, and the court of appeals' unexplained closure unnecessarily contributed to the public perception of official cover-up. This case, accordingly, presents an ideal opportunity to clarify both the reach and the importance of the First Amendment's guarantee of open judicial proceedings.

CONCLUSION

For the reasons stated above, petitioner urges this Court to grant review in this case.

Respectfully submitted,

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August 3, 2005

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5286

SIBEL EDMONDS,
Appellant

v.

DEPARTMENT OF JUSTICE, ET AL.,
Appellees

Appeal from the United States District Court
for the District of Columbia
(No. 02cv01448)

[Argued: April 21, 2005
Judgment filed: May 6, 2005]

Before: GINSBURG, *Chief Judge*, and SENTELLE and HENDERSON, *Circuit Judges*.

JUDGMENT

This cause was considered on the record from the United States District Court and on the briefs and arguments of the parties. It is

ORDERED AND ADJUDGED that the order of the district court dismissing Edmonds' claims is hereby affirmed for the reasons given in that court's opinion, 323 F. Supp. 2d 65 (D.D.C. 2004).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

FOR THE COURT:
Mark J. Langer, Clerk
By: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5286

D.C. Docket No. 02cv01448

SIBEL EDMONDS,
Appellant

v.

DEPARTMENT OF JUSTICE, ET AL.,
Appellees

[April 21, 2005]

Before: GINSBURG, *Chief Judge*, and SENTELLE and HENDERSON, *Circuit Judges*.

ORDER

Upon consideration of the emergency motion of appellant to open oral argument; the motion of amici curiae Project on Government Oversight and Public Citizen, Inc. to open the courtroom and to be heard; and the emergency motion of movants-intervenors The Washington Post, The New York Times, the Daily News L.P., Cable News Network LP, LLLP, Reuters America LLC, Bloomberg News, the Associated Press, the Society of Professional Journalists, the Reporters Committee for Freedom of the Press, The Hearst Corporation, the American Society of Newspaper Editors, the Maryland Delaware District of Columbia Press Association, and the Los Angeles Times to intervene and to open oral argument, it is

ORDERED that motion of movants-intervenors to intervene for the limited purpose of moving to open oral

argument be granted. It is

FURTHER ORDERED that the motions to open oral argument and to be heard be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Nancy G. Dunn
Nancy G. Dunn
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIBEL EDMONDS,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
v.	)	02-1448 (RBW)
	)	
UNITED STATES DEPARTMENT OF JUSTICE, *et al.*	)	
	)	
	)	
Defendants.	)	

[July 6, 2005]

MEMORANDUM OPINION

Following the terrorist attacks against our nation on September 11, 2001, the plaintiff was hired by the Federal Bureau of Investigation ("FBI") "as a contract linguist to perform translation services[.]" Complaint ("Compl.") ¶ 10. During the course of her employment with the FBI, the plaintiff asserts that she "reported a number of whistleblower allegations to FBI management officials concerning serious breaches in the FBI security program and a break-down in the quality of translations as a result of willful misconduct and gross incompetence." *Id.* ¶ 15. After the plaintiff's employment with the FBI was terminated, she filed the instant lawsuit alleging claims pursuant to the Privacy Act, 5 U.S.C. § 552a *et seq.* (2000), the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 551-52, 701-06 (2000), and the First and Fifth Amendments to the United States Constitution.[1] *Id.* ¶ 1. This matter is

[1] The Court notes that the plaintiff also filed a lawsuit against the FBI pursuant to the Freedom of Information Act

currently before the Court on the defendants' motion to dismiss the plaintiff's complaint ("Defs.' Mot."), in which the Attorney General of the United States has "formally assert[ed] the state secrets privilege to protect certain classified, national security information that goes to the core of the plaintiff's allegations [from being] disclosed."[2] Defs.' Mot., Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss Complaint Based on the State Secrets Privilege ("Defs.' Mem.") at 1. Upon consideration of the parties' submissions, *ex parte in camera reviews* of classified declarations submitted by the Attorney General and the Deputy Director of the FBI, and for the reasons set forth below, the Court will grant the defendants' motion to dismiss this case.

("FOIA"), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, seeking documents related to her employment with the FBI. *See Edmonds v. FBI*, 272 F. Supp. 2d 35 (D.D.C.2003) (Huvelle, J.). Of particular significance to this case is Judge Huvelle's grant of summary judgment to the government on its assertion of Exemption 1 of the FOIA as grounds for refusing to disclose certain documents. *Id.* at 45-49. As noted by Judge Huvelle, "Exemption 1 protects from mandatory disclosure under FOIA matters that are '(A) specifically authorized under criteria established by an Executive order to be secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.'" *Id.* at 45 (quoting 5 U.S.C. § 552(b)(1)).

[2] Also currently pending before it is an Emergency Motion of the United States to Quash Deposition of Sibel Edmonds, or for Protective Order filed with this Court in *Burnett v. Al Baraka Investment & Development Corp.*, Civ. A. No. 03-9849 (S.D.N.Y.). The United States seeks to have this Court quash a subpoena issued by the plaintiffs in *Burnett*, asserting that the states secret privilege precludes the *Burnett* plaintiffs from deposing Ms. Edmonds.

I. Factual Background

Although much of the information concerning the plaintiff's employment history with the FBI is classified and therefore will not be referenced in this opinion,[3] the plaintiff contends that between December 2001 and March 2002, while employed by the FBI, she reported a number of alleged acts of misconduct to the FBI.[4] Compl. ¶ 15. On February 7, 2002,

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[3] The contents of this Opinion contain only information that is already in the public domain (*i.e.*, the plaintiff's complaint) and which the government has not sought to have concealed through a sealing order or otherwise.

[4] These reports of misconduct included allegations that:

> (a) another employee, a contract monitor, who was granted a security clearance by the FBI, had past and ongoing association with one or more targets of an ongoing FBI investigation; (b) this same other employee was translating information obtained from FBI wire-taps concerning one or more targets with whom she had past and ongoing improper contacts; (c) the same other employee was suspected of leaking information to one or more targets of an FBI investigation to which she was assigned to perform translation services; (d) the other employee improperly instructed Plaintiff and another employee not to listen and translate certain FBI wire-taps because she knew the subjects and was confident that there would be nothing important to translate concerning those subjects or their conversations; (e) Plaintiff's supervisor issued instructions that assisted the other employee in carrying out misconduct; (f) the other employee threatened the lives and safety of Plaintiff and Plaintiff's family members, who were citizens of, and resided in, a foreign country, because Plaintiff refused to go along with the other employee's scheme to obstruct justice and because Plaintiff reported her concerns

the plaintiff states that she wrote a letter to the Acting Assistant Supervisory Agent in Charge ("ASAC") detailing her "concerns about security and management problems in the language department and requesting that prompt corrective action be taken." *Id.* ¶ 17. During the following week on February 13, 2002, the plaintiff states that she wrote a letter to an Executive Assistant Director for the FBI, "notifying him of [her] serious security concerns which potentially put Plaintiff's personal safety and the safety of her family at risk." *Id.* ¶ 20. The plaintiff then met with a Deputy Assistant Director for the FBI on March 7, 2002, to discuss her reports of misconduct. *Id.* ¶ 22. That same day, the plaintiff filed complaints with the FBI's Office of Professional Responsibility ("OPR") and the Department of Justice's Office of Inspector General ("OIG")

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about the other employee's wrongdoing to FBI management; (g) both as a result of misconduct by the other employee and Plaintiff's supervisor, and as a result of gross incompetence in the department, numerous translations were not properly conducted, and/or intentionally not conducted, which threatened intelligence and law enforcement investigations related to September 11th and other ongoing ... law enforcement investigations; (h) work order documents concerning translations related to September 11th investigations were falsified and contained forgeries of Plaintiff's name and/or initials; (i) Plaintiff's supervisor issued an instruction forbidding Plaintiff from raising her concerns to the FBI Special Agent assigned to the case, or others, without the permission of Plaintiff's supervisor; (j) extremely sensitive and material information was deliberately withheld from translations; and (k) FBI management had failed to take corrective action in response to Plaintiff's reports and serious concerns, and retaliated against Plaintiff for reporting her concerns.

Compl. ¶16.

detailing her "allegations of serious security breaches and misconduct." *Id.* ¶ 23. The plaintiff's employment with the FBI was terminated on March 22, 2002, *id.* ¶ 24, and a letter was sent to the plaintiff on April 2, 2002, explaining that her contract was "terminated completely for the Government's convenience." *Id.* ¶ 25.

Following the termination of her employment with the FBI, many of the events that now serve as the predicate to the plaintiff's claims in this lawsuit occurred. On May 8, 2002, the plaintiff states that her attorney sent a letter to both Attorney General John Ashcroft and FBI Director Robert S. Mueller indicating that "as a direct result of the FBI's failure to address or correct the serious misconduct and security breaches that were reported by Plaintiff[,] the safety and security of Plaintiff and her family has been jeopardized and that a foreign country has targeted Plaintiff's sister to be interrogated 'and taken/arrested by force.'" *Id.* ¶ 26. On this same day, Senator Charles E. Grassley sent a letter to the Director of the FBI indicating that the plaintiff "has come forward with a number of disturbing allegations about misconduct, incompetence, potential security violations and retaliatory threats." *Id.* ¶ 27. Senator Grassley also asked the FBI Director to "emphasize to [FBI] officials ... that retaliation against current or former FBI employees is not acceptable, especially when retaliation endangers a person's family member." *Id.* On June 8, 2002, the Associated Press ("AP") published an article that was purportedly "widely disseminated on its news wire, quoting 'Government officials, who spoke only on condition of anonymity,' about Plaintiff." *Id.* ¶ 28. This AP article stated that the defendants were conducting an investigation of the plaintiff's "whistleblower 'allegations of security lapses in the translator program that has played an important role interpreting interviews and intercepts of Osama bin Laden's network since Sept. 11.'" *Id.* ¶ 29. These officials who are alleged to have anonymously related this information to the AP also indicated

that "the FBI has been unable to corroborate the whistle-blower's allegations[,]" *id.*, that the plaintiff "subsequently was subjected to a security review herself," *id.* ¶ 30, and that "[t]he FBI has focused its investigation on whether either the accused or the whistle-blower compromised national security[.]" *Id.* ¶ 31. Then, on June 18, 2002, the Washington Post published an article, again "citing to Government officials who [stated that] the FBI fired Plaintiff because her disruptiveness hurt her on-the-job performance." *Id.* ¶ 32 (internal quotation marks omitted). The Washington Post article also reported that FBI officials stated that the plaintiff "had been found to have breached security." *Id.*

The plaintiff commenced the instant lawsuit on July 22, 2002. The plaintiff's Privacy Act claim alleges that confidential information maintained in the defendants' systems of records was unlawfully released to unauthorized individuals including "information that Plaintiff was subject to a security review, [and information about the] Plaintiff's job performance and other information contained in the Defendants' personnel, security and investigative files...." *Id.* ¶ 37. The plaintiff's First Amendment claim alleges that her complaints about misconduct constituted protected First Amendment conduct and that her termination amounted to retaliation by the FBI. *Id.* ¶¶ 51-52. Finally, the plaintiff's Fifth Amendment claim asserts that the termination of her employment and interference with her ability to obtain future employment by the defendants violated her rights to procedural due process and her due process liberty interest. *Id.* ¶ 63.

II. Legal Analysis

The state secrets privilege is a common law evidentiary rule that permits the United States to "block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security." *Ellsberg v. Mitchell*, 709 F.2d 51, 56 (D.C.Cir.1983). The District of Columbia Circuit has

explained that "[t]he various harms, against which protection is sought by invocation of the privilege, include impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments." *Id.* at 57 (footnotes omitted). A brief review of the history of the state secrets privilege is a necessary predicate to addressing the government's assertion of this privilege. The origins of the state secrets privilege can be traced back to the treason trial of Aaron Burr in *United States v. Burr*, 25 F. Cas. 30 (C.C.D.Va. 1807) (No. 14,692D). *See In re United States*, 872 F.2d 472, 474-75 (D.C.Cir.1989); *Ellsberg*, 709 F.2d at 56 n. 21. In *Burr*, the defendant sought access to a letter from General Wilkinson, who was the primary witness for the government against the defendant, to President Thomas Jefferson that purportedly contained information "in relation to the transactions of Mr. Burr, 'of whose guilt,' [General Wilkinson] says, 'there can be no doubt.' " 25 F. Cas. at 32. The government objected to the production of this letter, asserting that it was

> improper to call upon the president to produce the letter of Gen. Wilkinson, because it was a private letter, and probably contained confidential communications, which the president ought not and could not be compelled to disclose. It might contain state secrets, which could not be divulged without endangering the national security.

Id. at 31. Chief Justice Marshall, writing for the Court, noted that "such circumstances present a delicate question" because this was a capital case in which the defendant claimed that the letter was material to his defense. *Id.* at 37. The *Burr* Court, however, did not have to resolve whether this letter should be disclosed because there was "nothing before the court which show[ed] that the letter in question contain[ed] any matter the

disclosure of which would endanger the public safety." *Id.* Chief Justice Marshall stated that "[i]f it does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed." *Id.*

In 1875, the Supreme Court had the occasion to address the state secrets privilege in the case of *Totten v. United States*, 92 U.S. 105 (1875). In *Totten*, a lawsuit was

> brought to recover compensation for services alleged to have been rendered by ... William A. Lloyd, under a contract with President Lincoln, made in July 1861, by which he was to proceed South and ascertain the number of troops stationed at different points in the insurrectionary States, procure plans of forts and fortifications, and gain such other information as might be beneficial to the government of the United States, and report the facts to the President; for which services he was to be paid $200 a month.

Id. at 105-06. The Supreme Court found the suit could not be maintained, concluding:

> It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for

> professional advice, or of a patient to his physician for a similar purpose. Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed.

Id. at 107.

Although these early cases recognized the existence of the state secrets privilege, it was not until after World War II that this doctrine's "lineaments [were brought] into reasonably sharp focus." *Ellsberg*, 709 F.2d at 56. In the seminal case of *United States v. Reynolds*, 345 U.S. 1 (1953), a lawsuit was brought against the United States for the wrongful death of three civilians who were aboard a B-29 military airplane that crashed in Georgia. *Id.* at 2-3. The military crew and the civilians aboard the airplane were conducting a test of secret electronic equipment when the plane crashed. *Id.* at 3. During the pretrial phase of the litigation, the plaintiffs sought discovery of the government's accident investigation report and the statements of the surviving crew members. *Id.* The government opposed the plaintiffs' discovery motion, claiming that Air Force regulations prevented the disclosure of the requested information. *Id.* at 3-4. Following the district court's grant of the plaintiffs' discovery motion, the Secretary of the Air Force sought reconsideration and filed a formal "Claim of Privilege," asserting that the documents should not be produced "for the reason that the aircraft in question, together with the personnel on board, were engaged in a highly secretive mission of the Air Force." *Id.* at 4. In addition, the Judge Advocate General of the Air Force filed an affidavit attesting to the fact that documents could not be produced "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment." *Id.* at 4-5. The district court denied the government's motion for reconsideration and ordered the government to produce the documents. *Id.* at 5. The

government subsequently declined to produce the information and the district court "entered an order ... [which indicated] that the facts on the issue of negligence would be taken as established in [the] plaintiffs' favor[,]" and entered a final judgment for the plaintiffs. *Id.* In reversing the district court's decision, the Supreme Court began its analysis by noting that

> [j]udicial experience with the privilege which protects military and state secrets has been limited in this country. English experience has been more extensive, but still relatively slight compared with other evidentiary privileges. Nevertheless, the principles which control the application of the privilege emerge quite clearly from the available precedents. The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. *It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.*

Id. at 7-8 (emphasis added) (footnotes omitted). The *Reynolds* Court went on to note that the

> court must be satisfied from all the evidence and circumstances, and from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. If the court is so satisfied, the claim of the

> privilege will be accepted without requiring further disclosure.

Id. at 9 (internal quotations and citation omitted). As a general rule, the Supreme Court stated that

> the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but *even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.* A fortiori, where necessity is dubious, a formal claim of privilege, made under the circumstances of this case, will have to prevail.

Id. at 11 (emphasis added) (footnote omitted).

With the *Reynolds* case establishing the contours of the invocation of the state secrets privilege, those cases that have followed have attempted to sharpen the focus of the scope of judicial inquiry into this privilege. The District of Columbia Circuit has stated that "[t]o some degree at least, the validity of the government's assertion must be judicially assessed." *Molerio v. FBI*, 749 F.2d 815, 822 (D.C. Cir. 1984). In this regard, the *Reynolds* Court had cautioned that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." 345 U.S. at 9-10. And, the District of Columbia Circuit noted that "[t]o properly fulfill its obligations, while according the utmost deference to the executive's expertise in assessing privilege upon grounds of military or diplomatic security, *a court must uphold the privilege if the government shows that the information poses a reasonable danger to secrets of state.*" *In re United States*, 872 F.2d at 475 (internal quotation marks and citations omitted) (emphasis

added).

(A) Has the Government Properly Invoked the State Secrets Privilege?

(1) Personal Consideration Requirement

At the outset, this Court must address the plaintiff's contention that the defendants have not properly invoked the state secrets privilege in this case. Opposition to Defendants' Motion to Dismiss ("Pl.'s Opp'n") at 8-11. The plaintiff asserts that "the Attorney General does not explicitly state in his declaration that he has reviewed any documents other than a classified declaration prepared by a lower-ranking official, Bruce Gebhardt, the Deputy Director of the FBI." *Id.* at 9 (citing Declaration of John Ashcroft ("Ashcroft Decl.") ¶ 2). The plaintiff claims that "[t]his [Declaration] falls far short of the personal consideration and specificity requirements governing affidavits filed by heads of departments who assert the state secrets privilege." *Id.* (citations omitted).

To formally invoke the state secrets privilege, there must be: (1) a "formal claim of privilege," (2) "lodged by the head of the department which has control over the matter," (3) "after actual personal consideration by that officer." *Reynolds*, 345 U.S. at 7-8. On October 18, 2002, Attorney General Ashcroft filed a declaration with this Court, explaining that the

> purpose in submitting [the] Declaration is to assert, at the request of the Director of the Federal Bureau of Investigation, and in my capacity as Attorney General and head of the Department of Justice a formal claim of the state secrets privilege in order to protect the foreign policy and national security interests of the United States.

Ashcroft Decl. ¶ 2. The Attorney General explained that his "statements in this declaration are based on [his] personal

knowledge, on information provided to [him] in [his] official capacity, and on [his] evaluation of that information." *Id.* The Attorney General further explained that "[i]n personally considering this matter, I have also considered a classified declaration by Bruce J. Gebhardt, the Deputy Director of the Federal Bureau of Investigation...." *Id.*

The Court finds that the Attorney General has complied with the necessary prerequisites for the formal invocation of the state secrets privilege. It is undisputed that the Declaration of Attorney General Ashcroft constitutes a "formal claim of privilege" that has been asserted by the Attorney General in his capacity as head of the Department of Justice, which is the agency in control over the matter at issue. Relying principally upon the case of *Yang v. Reno,* 157 F.R.D. 625 (M.D. Pa. 1994), the plaintiff disputes whether the Attorney General has complied with the third prerequisite for invoking the state secrets privilege--the actual personal consideration by the Attorney General. In *Yang,* the government, as an alternative theory, asserted several privileges to limit the scope of discovery to prevent the plaintiffs, aliens from the People's Republic of China who were arrested and detained after their ship ran aground in New York Harbor, from taking "limited discovery from the government regarding potential political interference and/or bias by the Clinton Administration in the asylum proceedings pertinent to [the] case." *Id.* at 630. William H. Itoh, the executive secretary of the National Security Council ("NSC"), attempted to invoke the state secrets privilege to limit the scope of inquiry by the plaintiffs during the depositions of a staff member of the NSC and the former General Counsel of the Immigration and Naturalization Service. *Id.* at 630, 632. In denying the government's invocation of the state secrets privilege, the district court found that (1) Itoh was not competent to invoke the state secrets privilege, as he did not have the "kind of political and policy making authority contemplated by the *Reynolds* Court[,]" *id.* at 633, (2) there was

a lack of personal consideration of "the material for which the privilege was sought," *id.* at 634, and (3) there was a "lack of particularity in the government's identification of the material withheld and the reasons for withholding it." *Id.* In finding that there was a lack of personal consideration, the *Yang* Court examined the Itoh declaration, which indicated that he was "familiar with the types of issues and information that could arise should petitioners be permitted to question NSC staff regarding deliberations and recommendations of the Border Security Working Group [BSWG]" and that he "understand[s] that on a number of separate occasions, members of the BSWG attended meetings with and briefed the President and Vice President to discuss and develop United States Government policy with regard to the smuggling of aliens...." *Id.* The *Yang* Court concluded that "[b]ecause Mr. Itoh does not appear to have reviewed the specific content of the material for which privilege is sought, he is not competent to assert the state secrets ... privilege[ ]." *Id.* This is not the case here.

As noted above, the Attorney General states in his Declaration invoking the state secrets privilege that his statements "are based on [his] personal knowledge, on information provided to [him] in [his] official capacity, and on [his] evaluation of that information." Ashcroft Decl. ¶ 2. And he further notes, "[i]n personally considering this matter, I have also considered a classified declaration by Bruce J. Gebhardt, the Deputy Director of the Federal Bureau of Investigation...." *Id.* In addition, his Declaration states

> I understand that this lawsuit was filed by Sibel Edmonds, a former contract linguist with the FBI, and alleges violations of the Privacy Act, the First and Fifth Amendments of the United States Constitution, and the Administrative Procedures Act. I have been informed generally of the nature of plaintiff's claims in this case.

Id. ¶ 4. Attorney General Ashcroft goes on to state:

> Based on my personal consideration of the matter, I have concluded that further disclosure of the information underlying this case, including the nature of the duties of plaintiff or the other contract translators at issue in this case reasonably could be expected to cause serious damage to the national security interests of the United States.

Id. ¶ 5.

In *Yang*, the Court concluded that the personal consideration requirement of *Reynolds* was lacking since "Mr. Itoh d[id] not appear to have reviewed the specific content of the material for which privilege [was] sought [.]" 157 F.R.D. at 634. In this case, the Attorney General was informed of the plaintiff's claims and personally considered not only the nature of her claims,[5] but also information provided in a classified declaration prepared by the Deputy Director of the FBI that details the damage to both foreign policy and national security that would result from the disclosure of information related to the plaintiff's employment with the FBI. The Attorney General's Declaration is similar to one submitted to the court in *Kasza v. Browner*, 133 F.3d 1159 (9th Cir.1998). In that case, the Secretary of the Air Force stated:

> This Declaration is made for the purpose of

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[5] The plaintiff seems to suggest that the Attorney General must read her complaint prior to invoking the state secrets privilege. Opp'n at 9-10. There is, however, no case authority cited that would support such a position. Here, the Attorney General was informed of the plaintiff's claims and personally considered information, including a classified declaration, that led him to conclude that the state secrets privilege should be invoked.

> advising the court of the national security interests in and the security classification of information that may be relevant to the above captioned lawsuits. The statements made herein are based on (a) my personal consideration of the matter; (b) my personal knowledge; and (c) my evaluation of information made available to me in my official capacity.

Id. at 1168. In finding that there was the actual personal consideration necessary to invoke the state secrets privilege by the Secretary of the Air Force, the Ninth Circuit noted that "explaining through a competent official such as [the Air Force Vice Chief of Staff] how the claim of privilege plays out in practice is consistent with *Reynold's* insistence that the decision to object be made at the highest level." *Id.* at 1169 (citing *In re United States,* 872 F.2d at 474 (classified declaration of assistant director of the FBI's Intelligence Division submitted for *in camera* review in support of Attorney General's formal invocation of the state secrets privilege); *Molerio,* 749 at 821 (suggesting that designee could determine that state secret privilege was implicated in discovery); *Halkin v. Helms,* 598 F.2d 1, 9 (D.C.Cir.1978) (privilege invoked by Secretary of Defense was supported by *in camera* testimony of Deputy Director of the National Security Agency)). Here, not only does the Attorney General's Declaration reflect a similar level of personal consideration as the declaration submitted by the Secretary of the Air Force in *Kasza,* but it too is supported by a classified declaration of a competent subordinate official--the Deputy Director of the FBI. Thus, the Court finds that the Attorney General has satisfied the "personal consideration" requirement of *Reynolds.*

(2) Specificity Requirement

Aside from claiming that the Attorney General's Declaration fails to satisfy the personal consideration requirement of

Reynolds, the plaintiff also asserts that the Declaration fails to satisfy *Reynolds* specificity requirements so as to allow meaningful judicial review. Pl.'s Opp'n at 11-16. This challenge presents a more difficult question as the Attorney General's unclassified Declaration does not specify in any detail the harm that might occur to national security should this information be disclosed. The Attorney General's Declaration simply states:

> Based on my personal consideration of the matter, I have concluded that further disclosure of the information underlying this case, including the nature of the duties of plaintiff or the other contract translators at issue in this case reasonably could be expected to cause serious damage to the national security **76* interests of the United States. Any further elaboration concerning this matter on the public record would reveal information that could cause the very harms my assertion of the state secrets privilege is intended to prevent.

Ashcroft Decl. ¶ 5. In *Linder v. Department of Defense*, 133 F.3d 17 (D.C.Cir.1998), the District of Columbia Circuit stated that judicial review of the invocation of the state secrets privilege involves either review of

> some form of detailed public explanation of 'the kinds of injury to national security [they] seek[ ] to avoid and the reason those harms would result from revelation of the requested information,' or indicated 'why such an explanation would itself endanger national security.' Or, if necessary, the court would have had to examine the privileged materials *in camera* to satisfy itself that invocation of the privilege was proper.

Id. at 23 (quoting Ellsberg, 709 F.2d at 63-64.) The *Linder*

Court based its assessment on the Circuit's observations in *Ellsberg*. *Id.* There, the District of Columbia Circuit thoroughly discussed the specificity requirements of the state secrets privilege. The *Ellsberg* Court stated that

> in situations in which close examination of the government's assertions is warranted, the trial judge should insist (1) that the formal claim of privilege be made on the public record and (2) that the government either (a) publicly explain in detail the kinds of injury to national security it seeks to avoid and the reason those harms would result from revelation of the requested information or (b) indicate why such an explanation would itself endanger national security. We wish to make clear the limitations of our ruling: The government's public statement need be no more (and no less) specific than is practicable under the circumstances.

709 F.2d at 63-64 (footnote omitted). Here, the Attorney General represented that his "classified declaration, along with the classified Gebhardt Declaration, [were] ... available ... for *in camera, ex parte* review to provide a more detailed explanation of the information at issue and the harms to national security that would result from its disclosure." Ashcroft Decl. ¶ 5. Thus, this situation called for the Court "to examine the privileged materials *in camera* to satisfy itself that invocation of the privilege was proper." *Linder*, 133 F.3d at 23. This Court therefore reviewed several classified declarations, including the declarations of Attorney General Ashcroft and FBI Deputy Director Gebhardt, which specifically detail the "reasonable danger" that revelation of classified information would have on both "intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments." *Ellsberg*, 709 F.2d at 57. After undertaking this review, the Court is satisfied that the classified declarations contain a

sufficient degree of specificity to establish that the invocation of the state secrets privilege is proper. However, this Court is "unable publicly to explain [its] conclusion in any more detail. It is one of the unfortunate features of this area of the law that open discussion of how the general principles apply to particular facts is impossible." *Id.* at 59 n. 41 (citation omitted).

That privileged information has already been released to the press or provided in briefings to Congress does not alter the Court's conclusion. In *Fitzgibbon v. CIA*, 911 F.2d 755 (D.C. Cir. 1990), the District of Columbia Circuit stated that "the fact that information resides in the public domain does not eliminate the possibility that further disclosures can cause harm to intelligence sources, methods, and operations." *Id.* at 766. In the plaintiff's FOIA case, the court addressed the same contention raised by the plaintiff in her efforts to gain the release of documents protected by the government's invocation of the national security exemption from the FOIA's mandatory disclosure rules. *Edmonds*, 272 F. Supp.2d at 48-49. Judge Huvelle found that

> a comparison of the information contained in the documents withheld ... with the quoted statements in the media which have been attributed to the government, the information that is being withheld is not identical to the information in the public domain. Rather, the withheld information is far more detailed and its release could provide a composite picture, or at least additional information, that would be harmful to national security. Moreover, since the statements in the press were made by anonymous sources, even documents containing identical information may properly be withheld because 'release would amount to official confirmation or acknowledgment of their accuracy.'

Id. at 49 (quoting *Washington Post v. United States Dep't of Def.*, 766 F. Supp. 1, 9 (D.D.C.1991) (Judge Huvelle noted that *Washington Post* stands for the proposition that "information in the public domain may be withheld where withheld information is more detailed and release of that information poses a threat to national security; even if the information is exactly the same, it may be withheld if revealing the context in which the information is discussed would itself disclose additional information that would be harmful to national security; or if release of the withheld information would amount to official confirmation or acknowledgment of its accuracy")). The court went on to note that "the fact that the FBI provided information to members of Congress regarding plaintiff's whistleblower allegations does not deprive defendant of the right to classify the information..., for disclosure of information to a congressional committee does not constitute a waiver." *Id.* (citing *Fitzgibbon*, 911 F.2d at 766 ("government transmission of 'an official document to a congressional committee does not mean that the Agency can thereby automatically be forced to release any number of other documents' ") (other citations omitted)). This Court sees no reason to come to a different conclusion in this case.

(B) <u>If the Government has Properly Invoked the State Secrets Privilege, Should this Case be Dismissed?</u>

Once the government has properly invoked the state secrets privilege, the inquiry shifts to the application of the privilege to the case at hand. As this Court stated above, it must "uphold the privilege if the government shows that 'the information poses a *reasonable danger* to secrets of state.' " *In re United States*, 872 F.2d at 475 (internal quotation marks and citations omitted) (emphasis added); *see Ellsberg*, 709 F.2d at 58 ("the government need not demonstrate that injury to the national interest will inevitably result from disclosure; *a showing of 'reasonable danger' that harm will ensue is sufficient.*") (footnote omitted) (emphasis added). In undertaking this

analysis, not only must this Court "accord[ ] the utmost deference to the executive's expertise in assessing privilege upon grounds of military or diplomatic security," *id.* (internal quotation marks and citations omitted), but it must be mindful, especially at a time when our nation's security is threatened by acts of terrorism, that

> [i]t requires little reflection to understand that the business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate.

Id. (quoting *Halkin*, 598 F.2d at 8).

It is generally understood that "[t]he application of the state secrets privilege can ... have three effects." *Doe v. Tenet*, 329 F.3d 1135, 1149 (9th Cir. 2003) (quoting *Kasza*, 133 F.3d at 1166). As the Ninth Circuit explained:

> First, by invoking the privilege over particular evidence, the evidence is completely removed from the case. The plaintiff's case then goes forward based on evidence not covered by the privilege. If, after further proceedings, the plaintiff cannot prove the prima facie elements of her claim with nonprivileged evidence, then the court may dismiss her claim as it would with any plaintiff who cannot prove her case.
>
> Alternatively, if the privilege deprives the *defendant* of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant.

> Finally, notwithstanding the plaintiff's ability to produce nonprivileged evidence, if the very subject matter of the action is a state secret, then the court should dismiss the plaintiff's action based solely on the invocation of the state secrets privilege. While dismissal of an action based on the state secrets privilege is harsh, the results are harsh in either direction and the state secrets doctrine finds the greater public good--ultimately the less harsh remedy--to be dismissal.

Kasza, 133 F.3d at 1166-67 (internal quotation marks and citations omitted); *see Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991) ("In some cases, the effect of the invocation of the privilege may be so drastic as to require dismissal. Thus, if proper assertion of the privilege precludes access to evidence necessary for the plaintiff to state a prima facie claim, dismissal is appropriate. Similarly, it has been held that if the court determines that the privilege so hampers the defendant in establishing a valid defense that the trier is likely to reach an erroneous conclusion, then dismissal is also proper.") (citations omitted); *In re United States*, 872 F.2d at 476 ("The effect of a valid claim of privilege on the outcome of a particular case depends on the purpose that the privileged information would have served. If the information is essential to establishing plaintiff's prima facie case, dismissal is appropriate. If, on the other hand, the information related not to the plaintiff's claim, but rather to the defense, summary judgment against the plaintiff is proper if the district court decides that the privileged information, if available to the defendant, would establish a valid defense to the claim.") (citations omitted).

In undertaking its role to "critically ... examine instances of [the] invocation" of the state secrets privilege in this case, the Court is mindful that "the privilege may not be used to shield any material not strictly necessary to prevent injury to national

security; and, whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter." *Ellsberg*, 709 F.2d at 57 (footnote omitted). For this reason, following the Court's initial review of the classified declarations submitted by the government, the Court issued an Order on June 3, 2004, requiring the government to specifically detail why it is not possible to disentangle sensitive information from nonsensitive information to permit the plaintiff's claims to go forward and for the government to defend against these claims. June 3, 2004 Order. The government subsequently submitted an additional classified declaration specifically addressing in great detail why each of the plaintiff's claims is unable to go forward without the release of privileged information. Upon conducting a thorough review of the several classified declarations, the Court finds that the plaintiff is not only unable to prove the prima facie elements of each of her claims without the disclosure of privileged information, but that the defendants are unable to assert valid defenses to her claims without such disclosures.

(1) Plaintiff's First Amendment Claim

The plaintiff's complaint states that she "engaged in activity protected by the First Amendment to the U.S. Constitution by reporting serious problems within the FBI translator program which has a direct and significant bearing on matters of widespread public concern." Compl. ¶ 51. The plaintiff asserts that she was terminated from the FBI for engaging in this protected activity. *Id.* ¶ 52.

While the speech of public employees "enjoys considerable First Amendment protection[,]" to assert a viable First Amendment claim, the plaintiff would have to satisfy a four-prong test. *O'Donnell v. Barry*, 148 F.3d 1126, 1133 (D.C. Cir. 1998) (citations omitted). The four-part test, as articulated by the District of Columbia Circuit, is as follows:

> First, the public employee must have been

> speaking on a matter of public concern. If the speech is not of public concern, it is unnecessary to scrutinize the basis for the adverse action absent the most unusual circumstances. Second, the court must consider whether the governmental interest in promoting the efficiency of the public services it performs through its employees without disruption, outweighs the employee's interest, as a citizen, in commenting upon matters of public concern, and the interest of potential audiences in hearing what the employee has to say[.] Third, the employee mush show that her speech was a substantial or motivating factor in prompting the retaliatory or punitive act of which she complains. And finally, the employer should have an opportunity to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct.

Id. (internal quotation marks and citations omitted). The government asserts, and this Court must agree, that any effort by the plaintiff to establish these elements or by the defendants to rebut them would risk disclosure of privileged information. Def.'s Mem. at 10. This is because not only is the nature of the plaintiff's employment the subject of the state secrets privilege, but so are the events surrounding her termination. Thus, the plaintiff could not establish, nor could the defendants rebut, whether the plaintiff's speech during the course of her employment was on a matter of public concern, whether a balancing could be undertaken of the government's interest versus the plaintiff's interest in disclosure of this information, whether the plaintiff's speech was the motivating fact for her termination, or whether there were other reasons for her termination, without revealing privileged information.

Accordingly, this Court must find that the plaintiff's First Amendment claim cannot be pursued.

(2) Plaintiff's Fifth Amendment Claim

The plaintiff also asserts that the "[d]efendants have violated [p]laintiff's right to procedural due process and her due process liberty interest pursuant to the Fifth Amendment to the U.S. Constitution as a result of [d]efendants' termination of [p]laintiff's employment and [d]efendants' interference with [p]laintiff's opportunity to obtain future employment in her chosen career." Compl. ¶ 63. The plaintiff alleges that the defendants accomplished this by "intentionally and willfully releas[ing] derogatory and confidential information about [p]laintiff and ma[king] defamatory statements about [p]laintiff in addition to discharging her from her duties in violation of [her] right to due process." *Id.* ¶ 64.

It is well understood that a non-tenured government employee[6] does not have a property interest in her job. *Lyons v. Barrett*, 851 F.2d 406, 410 (D.C. Cir.1988). However, "[t]he Supreme Court has long recognized that a liberty interest may be implicated when an attack is made upon an individual's 'good name, reputation, honor, or integrity....'" *Id.* (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)). When such a claim is made, "the appropriate remedy is a hearing in which the dismissed employee is given an opportunity to refute the charges and clear [her] name." *Id.* (citing *Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1112 (D.C. Cir. 1985)). However, in this case it is impossible for the parties to participate in a trial in order to give the plaintiff an opportunity

---

[6] A non-tenured government employee is an individual that has a "legitimate claim of entitlement to continued employment absent sufficient cause." *Lyons v. Barrett*, 851 F.2d 406, 410 (D.C. Cir. 1988) (internal quotation marks and citations omitted) (quoting *Perry v. Sindermann*, 408 U.S. 593, 602-03 (1972)).

to refute the allegations made about her because the nature of the charges allegedly made by the anonymous government official to the press is comprised of privileged information. And, for the same reasons the plaintiff's First Amendment claim cannot be pursued, this claim cannot proceed since the defendant will be unable to adequately rebut the plaintiff's assertions without revealing privileged information. As the government observed in its motion to dismiss, the "litigation over the truth of [purported defamatory] statements [made by the FBI] would again necessarily implicate the classified nature of plaintiff's duties with the FBI and the substance of what happened in the underlying dispute." Def.'s Mem. at 13. Accordingly, this Court must also find that the plaintiff's Fifth Amendment claim cannot go forward.

(3) Plaintiff's Privacy Act Claims

Finally, with respect to the plaintiff's Privacy Act claims, the Court also finds that the plaintiff is unable to establish these claims, nor will the defendants be able to rebut her allegations without the disclosure of privileged information. The heart of the plaintiff's Privacy Act claims is that "[d]efendants DOJ and FBI, through their officers, employees, agents, and representatives, commenced intentionally and/or willfully disclosing and releasing to unauthorized persons the contents of records maintained by [d]efendants in one or more systems of records pertaining to [p]laintiff['s]" employment, termination and security review. Compl. ¶ 37. The government asserts that the "plaintiff's Privacy Act claims would implicate the central issues that consume the whole of this litigation--the duties of plaintiff and her co-workers, the plaintiff's underlying allegations, and the facts, documents, and evidence in connection therewith." Def.'s Mem. at 15. In order to litigate plaintiff's Privacy Act claims, the government points out that "it would be necessary to probe the content of what may be contained in a system of records and who had access to it, and for an accuracy claim, the substantive content of information in

a system of records would be directly at issue." *Id.* Aside from the disclosure of these privileged documents that comprise the system of records, because the plaintiff is unaware of who released this information, deposition testimony would have to be taken. However, as the nature of the plaintiff's employment is privileged information, "identifying the individuals involved, where they work, what they do, their personal background, and their expertise" is not possible. *Id.* Furthermore, because the circumstances surrounding the underlying allegations are privileged, even if the plaintiff could depose the individuals who could provide information about the events, such inquiries are also impossible. And, in an action for damages under the Privacy Act, the plaintiff would have to show that the violation was so " 'patently egregious and unlawful' that anyone undertaking the conduct should have known it 'unlawful.' " *Laningham v. United States Navy,* 813 F.2d 1236, 1242 (D.C. Cir. 1987) (citations omitted). Without access to the information covered by the privilege or the ability to depose witnesses who may have knowledge of the events, the Court is unable to fathom how the plaintiff could prove that the defendants acted in a "patently egregious and unlawful" manner. Accordingly, because the Court finds that documents related to the plaintiff's employment, termination and security review that comprise the system of records are privileged, and because the plaintiff would be unable to depose witnesses whose identities are privileged or to otherwise identify through discovery the individual or individuals who purportedly released the privileged information, the plaintiff is also unable to proceed with her Privacy Act claims.

III. Conclusion

The District of Columbia Circuit has stated that "[d]ismissal of a suit, and the consequent denial of a forum without giving the plaintiff her day in court ... is indeed draconian. '[D]enial of the forum provided under the Constitution for the resolution of disputes, U.S. Const. art. III, § 2, is a drastic remedy that has

rarely been invoked.' " *In re United States*, 872 F.2d at 477 (quoting *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1242 (4th Cir.1985)). Mindful of the need for virtual unfettered access to the judicial process in a governmental system integrally linked to the rule of law, the Court nonetheless concludes that the government has properly invoked the state secrets privilege, as the Attorney General, after actual personal consideration, made a formal claim of the privilege in both an unclassified declaration and a classified declaration that contains the requisite specificity needed to properly invoke the privilege. The Court's review of the classified declarations submitted by the government adequately demonstrates that the information that would have to be revealed for this case to be litigated poses a "reasonable danger to secrets of state." *Id.* at 475 (citation omitted). And, after an *ex parte, in camera* review of the additional information provided to the Court pursuant to its June 3, 2004 Order, the Court is satisfied that it is not possible for "sensitive information [to] be disentangled from nonsensitive information to allow for the release of the latter." *Ellsberg*, 709 F.2d at 57 (footnote omitted). Accordingly, because the Court finds that the plaintiff is unable to establish her First Amendment, Fifth Amendment and Privacy Act claims without the disclosure of privileged information, nor would the defendants be able to defend against these claims without the same disclosures, the plaintiff's case must be dismissed,[7] albeit

---

[7] In concluding that the state secrets privilege is applicable to this case, the Court finds that dismissal of this suit is the necessary result. While the Court had contemplated alternative remedies short of dismissal, for example staying the case to await the possibility that one day the privileged information will no longer constitute a state secret, it must conclude that there are no viable alternatives. This is due not only to the nature of the information, but also because the imminent threat of terrorism will not be eliminated anytime in the foreseeable future, but is an endeavor that will consume our nation's

with great consternation, in the interests of national security.[8]

SO ORDERED, this 6th day of July 2004.

REGGIE B. WALTON
United States District Judge

---

attention indefinitely. Moreover, with the case in this posture, the plaintiff will be able to immediately seek appellate review, rather than having these proceedings stayed, which would delay indefinitely the plaintiff's ability to seek appellate relief.

[8] An Order consistent with the Court's ruling accompanies this Memorandum Opinion.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIBEL EDMONDS,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
v.	)	02-1448 (RBW)
	)	
UNITED STATES DEPARTMENT OF JUSTICE, *et al.*	)	
	)	
	)	
Defendants.	)	

[June 3, 2004]

ORDER

This matter comes before the Court on the defendants' motion to dismiss the plaintiff's complaint ("Defs.' Mot."), in which the Attorney General of the United States has "formally assert[ed] the state secrets privilege to protect certain classified, national security information that goes to the core of the plaintiff's allegations [from being] disclosed." Defs.' Mot., Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss Complaint Based on the State Secrets Privilege ("Defs.' Mem.") at 1. The Court, having conducted an *in camera* inspection of classified declarations submitted by the government, is nonetheless mindful of the District of Columbia Circuit's observation in Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir. 1983), that the state secrets "privilege may not be used to shield any material not strictly necessary to prevent injury to national security; and, whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter." *Id.* at 57 (footnote omitted). Here, the government seeks the

"drastic remedy" of the dismissal of the plaintiff's suit, which is grounded on the government's assertion of the state secrets privilege. *In re United States*, 872 F.2d 472, 477 (D.C. Cir. 1989) (noting that "[d]ismissal of a suit, and the consequent denial of a forum without giving the plaintiff her day in court . ... is indeed draconian."). The Court, however, is fully aware that even to a greater extent now,

> [i]t requires little reflection to understand that the business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate.

Halkin v. Helms, 598 F.2d 1, 8 (D.C. Cir. 1978). Thus, in considering whether dismissal of this case is appropriate in order to protect national security, the Court must assure itself that the plaintiff would be unable to prosecute this case in any manner without the disclosure of privileged information. Accordingly, it is hereby this 3rd day of June, 2004

ORDERED that the government shall produce a declaration articulating its position regarding why "sensitive information [cannot] be disentangled from nonsensitive information" in order to allow the plaintiff to proceed with her claims. The government should focus its response to this Order on why the plaintiff is unable to proceed with her claims and why the government cannot defend against these claims without revealing classified information. The government shall produce this declaration to the Court for its *ex parte*, in camera inspection by Wednesday, June 9, 2004.

SO ORDERED.

REGGIE B. WALTON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIBEL EDMONDS,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
v.	)	02-1448 (RBW)
	)	
UNITED STATES DEPARTMENT OF JUSTICE, *et al.*	)	
	)	
Defendants.	)	

[April 26, 2004]

ORDER

On April 26, 2004, this Court granted the Emergency Motion of the United States to Quash Deposition of Sibel Edmonds in *Burnett v. Al Baraka Investment & Development Corp.*, Civil Action No. 03-9848 (S.D.N.Y. 2003). In accordance with the oral rulings made by this Court at that hearing, it is hereby this 26th day of April, 2004

ORDERED that the government shall produce the classified documents in this case to the Court for its *ex parte, in camera* inspection on May 10, 2004 at 2:00 p.m. It is

FURTHER ORDERED that the government shall also provide to the Court any unclassified documents or other unclassified information in its possession that has been presented to the United States Senate or any other forum or individuals which is relevant to the substance of Sibel Edmonds potential deposition testimony by May 10, 2004.

SO ORDERED.

REGGIE B. WALTON
United States District Judge

Excerpts from the Privacy Act, 5 U.S.C. § 552 *et seq.*

§ 552a(a). Definitions

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13;

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected;

(8) the term "matching program"--

(A) means any computerized comparison of--

(i) two or more automated systems of records or a system of records with non-Federal records for the purpose of--

(I) establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefit programs, or

(II) recouping payments or delinquent debts under such Federal benefit programs, or

(ii) two or more automated Federal personnel or payroll systems of records or a system of Federal personnel or payroll records with non-Federal records,

(B) but does not include--

(i) matches performed to produce aggregate statistical data without any personal identifiers;

(ii) matches performed to support any research or statistical project, the specific data of which may not be used to make decisions concerning the rights, benefits, or privileges of specific individuals;

(iii) matches performed, by an agency (or component thereof) which performs as its principal function any activity pertaining to the enforcement of criminal laws, subsequent to the initiation of a specific criminal or civil law enforcement investigation of a named person or persons for the

purpose of gathering evidence against such person or persons;

(iv) matches of tax information (I) pursuant to section 6103(d) of the Internal Revenue Code of 1986, (II) for purposes of tax administration as defined in section 6103(b)(4) of such Code, (III) for the purpose of intercepting a tax refund due an individual under authority granted by section 404(e), 464, or 1137 of the Social Security Act; or (IV) for the purpose of intercepting a tax refund due an individual under any other tax refund intercept program authorized by statute which has been determined by the Director of the Office of Management and Budget to contain verification, notice, and hearing requirements that are substantially similar to the procedures in section 1137 of the Social Security Act;

(v) matches--

(I) using records predominantly relating to Federal personnel, that are performed for routine administrative purposes (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)); or

(II) conducted by an agency using only records from systems of records maintained by that agency; if the purpose of the match is not to take any adverse financial, personnel, disciplinary, or other adverse action against Federal personnel [FN1]

(vi) matches performed for foreign counterintelligence purposes or to produce background checks for security clearances of Federal personnel or Federal contractor personnel;

(vii) matches performed incident to a levy described in section 6103(k)(8) of the Internal Revenue Code of 1986; or

(viii) matches performed pursuant to section 202(x)(3) or 1611(e)(1) of the Social Security Act (42 U.S.C. 402(x)(3), 1382(e)(1));

(9) the term "recipient agency" means any agency, or contractor thereof, receiving records contained in a system of records from a source agency for use in a matching program;

(10) the term "non-Federal agency" means any State or local government, or agency thereof, which receives records contained in a system of records from a source agency for use in a matching program;

(11) the term "source agency" means any agency which discloses records contained in a system of records to be used in a matching program, or any State or local government, or agency thereof, which discloses records to be used in a matching program;

(12) the term "Federal benefit program" means any program administered or funded by the Federal Government, or by any agent or State on behalf of the Federal Government, providing cash or in-kind assistance in the form of payments, grants, loans, or loan guarantees to individuals; and

(13) the term "Federal personnel" means officers and employees of the Government of the United States, members of the uniformed services (including members of the Reserve Components), individuals [FN2] entitled to receive immediate or deferred retirement benefits under any retirement program of the Government of the United States (including survivor benefits).

§ 552a(b). Conditions of Disclosure

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head

of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the Government Accountability Office;

(11) pursuant to the order of a court of competent jurisdiction; or

(12) to a consumer reporting agency in accordance with section 3711(e) of title 31.

§ 552a(c). Accounting of Certain Disclosures

Each agency, with respect to each system of records under its control, shall--

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of--

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this

subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

§ 552a(e)(6),(7),(9),(10). Agency Requirements

Each agency that maintains a system of records shall . . .

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

* * *

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the

penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained;

April 12, 2005

Mr. Mark J. Langer
Clerk, United States Court of Appeals
for the District of Columbia Circuit
United States Courthouse
Third and Constitution Avenue, N.W.
Washington, D.C. 20001

RE: Edmonds v. DOJ, No. 04-5286
Oral argument scheduled for April 21, 2005

Dear Mr. Langer:

This case is scheduled for oral argument on April 21, 2005. I am writing to remind the Court that this case involves sealed, classified information, which has been filed with the court under special security arrangements. As the Court is aware, the government has filed a Sealed Supplemental Appendix, which includes classified information. The classified information has been provided to the Court by the Department of Justice, pursuant to 50 U.S.C. § 1702(c), with the understanding that the secrecy of this information will be properly protected. See 28 C.F.R. § 17.17 (regulations providing that classified information may be disclosed by Justice Department attorneys to a court, as long as proper security measures are taken). Counsel for the plaintiff-appellant in this case have **not** had access to this classified information.

We are prepared to argue this case publicly, in an open courtroom, without referring to the classified information itself. However, if the Court has questions about the classified information or wishes to discuss it, or if it becomes necessary for government counsel to answer questions by referring to this information, we assume that the courtroom will be cleared of all

persons other than the judges and the attorneys for the government (and the agency personnel working with them), or that these points can be discussed in some other secure environment. This Court has followed a similar procedure in other cases, including the oral argument in National Council of Resistance of Iran v. Department of State, Nos. 99-1438, 99-1439 (D.C. Cir.), when the Court wished to ask questions regarding classified information on the record.

Please distribute this letter to the judges assigned to this case. Thank you for your assistance.

Sincerely,
/s/ H. Thomas Byron III
H. Thomas Byron III
Attorney, Appellate Staff
Civil Division

cc:

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No. 05-190

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In The
Supreme Court of the United States

SIBEL EDMONDS,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICI CURIAE* OF NATIONAL SECURITY ARCHIVE, THE PROJECT ON GOVERNMENT SECRECY OF THE FEDERATION OF AMERICAN SCIENTISTS, THE NATIONAL WHISTLEBLOWER CENTER, THE PROJECT ON GOVERNMENT OVERSIGHT, PUBLIC CITIZEN, INC., THE GOVERNMENT ACCOUNTABILITY PROJECT, THE NATIONAL FREEDOM OF INFORMATION COALITION, AMERICAN LIBRARY ASSOCIATION, THE NATIONAL AIR DISASTER ALLIANCE, AND SEPTEMBER 11TH ADVOCATES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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October 10, 2005

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INTEREST OF THE *AMICI CURIAE*

Amici Curiae submit this brief in support of Petitioner Sibel Edmonds, a contract linguist fired by the Federal Bureau of Investigation (FBI) in retaliation for reporting serious problems in the translation unit where she worked.[1] Ms. Edmonds brought this case to challenge her termination and seek redress for government disclosures to the media about her. After Ms. Edmonds filed suit, the Government classified all of the information related to her case and invoked the state secrets privilege, even though it had previously released much of the information during unclassified congressional briefings, and even though much of that information had been disseminated to the public through the traditional media and on the Internet. The District Court dismissed Ms. Edmonds' case on the basis of the Government's invocation of the privilege. Cert. App. 5a-33a.

On January 14, 2005, the U.S. Department of Justice Office of the Inspector General released a detailed, 39-page "Unclassified Summary" of a 100-page report in which it concludes that "many of [Ms. Edmonds'] allegations were supported, that the FBI did not take them seriously enough, and that her allegations were, in fact, the most significant factor in the FBI's decision to terminate her services."[2]

The Court of Appeals for the District of Columbia Circuit sealed the courtroom during argument on Ms. Edmonds' appeal and affirmed the District Court ruling without separate written opinion. Cert. App. 1a-2a.

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[1] The parties have consented to the filing of this brief. Letters of consent are on file with the clerk's office. This brief was not authored in whole or part by counsel for a party, and no person or entity, other than the *amici curiae*, its members and its counsel made a monetary contribution to the preparation and submission of this brief.

[2] Office of Inspector General, Dep't of Justice, *A Review of the FBI's Actions in Connection With Allegations Raised by Contract Linguist Sibel Edmonds* 31 (2005) (hereinafter "DOJ OIG Report"), http://www.usdoj.gov/oig/special/0501/final.pdf.

Several of the *amici* are nonprofit organizations that have long monitored government secrecy policy. Since the September 11 attacks, these *amici* have seen a dramatic increase in barriers to information. These *amici* have seen how openness has proven to be a check against government abuses and has advanced the security of the nation.

The other *amici* are nonprofit associations that represent the families of victims of the 9/11 terrorist attacks. These groups work for greater public access to government information relating to the attacks.

Amici file this brief to urge the Court to provide meaningful review to the Government's claimed need for secrecy in this case. Unquestioning judicial deference to Government secrecy claims permits the Government to hide from the public matters that do not put national security at risk. Those matters, whether withheld as a litigation strategy, for convenience, or for malfeasance, do not merit judicial protection. The need for meaningful judicial review of secrecy claims is at its highest when the Government seeks to interfere with fundamental rights, such as Ms. Edmonds' right to bring her suit. *Amici* wish to alert the Court that the summary disposition of Ms. Edmonds' constitutional and statutory claims sends a clear and chilling message to government employees – namely, that an employee calls public attention to problems at the agency, even those that endanger national security, at his or her peril.

The National Security Archive is a non-governmental research institute and library located at the George Washington University that collects and publishes declassified documents concerning United States foreign policy and national security matters.

The Project on Government Secrecy of the Federation of American Scientists promotes public access to government information through research, advocacy, investigative reporting, and publication of government records.

The National Whistleblower Center (NWC) promotes public access to information and government accountability through research, public education and advocacy. NWC

has provided support and advocacy on behalf of employee-whistleblowers who have exposed abuse of civil liberties and civil rights by the Federal Bureau of Investigation.

The Project On Government Oversight (POGO) is a politically-independent, nonprofit watchdog that strives to promote a government that is accountable to the citizenry. POGO investigates, exposes, and seeks to remedy systemic abuses of power, mismanagement, and subservience by the federal government to powerful special interests.

Public Citizen, Inc., a public interest organization with approximately 130,000 members, appears before Congress, administrative agencies, and the courts on a wide range of issues. In particular, Public Citizen promotes openness and democratic accountability in government by requesting and making use of government records, and by providing technical and legal assistance to individuals, public interest groups, and the media who seek access to information held by government agencies.

The Government Accountability Project is a 28-year-old non-profit public interest group that promotes government and corporate accountability by advancing occupational free speech, defending whistleblowers, and empowering citizen activists.

The National Freedom of Information Coalition is the national organization of state groups dedicated to fostering access to government records and meetings.

The American Library Association is the oldest and largest library association in the world, with over 65,000 members and a mission to provide leadership in the development, promotion and improvement of library and information services to enhance learning and ensure access to information for all.

The National Air Disaster Alliance is the largest grassroots air safety organization in the United States, representing survivors, those who have lost loved ones, aviation professionals, the traveling public, and others affected by over 100 air disasters worldwide including the 9/11 terrorist attacks. It is a non-profit corporation that

seeks to raise the standard of safety, security, survivability, and support through constructive communications with all levels of government, public and private agencies, manufacturers, and industry associations.

September 11th Advocates (a.k.a. "The Jersey Girls") is a group of family members of 9/11 victims formed to advocate for an independent commission to investigate the terrorist attacks and congressional action to implement the commission's recommendations.

This brief is filed with the consent of counsel for all parties in the case.

SUMMARY OF ARGUMENT

The United States was founded on democratic principles that recognize the importance of informed public debate concerning government activities. The need for such debate is at its apex in the area of national defense and military relations. Yet, the Government's reflexive response to national security threats is to increase secrecy. That reaction does not necessarily serve the national interest. As the numerous investigations into the September 11 attacks on the United States each concluded, excessive secrecy was part of the problem that interfered with detection and prevention of the attacks.

In the four years since the September 11 attacks on the United States, there has been a growing invocation of national security necessity as a justification for increased secrecy. Increasingly, the government appears to be using its most potent tool against judicial review, the state secrets privilege, to forestall all independent consideration of legal claims against law enforcement, intelligence and military agencies.

Experience shows, however, that the Government does not always have an incentive to limit secrecy to instances when national security demands such protection. Thus, meaningful judicial review is necessary to separate out the legitimate and illegitimate claims for secrecy.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY TO THE LOWER COURTS THE SIGNIFICANT ROLE THAT JUDICIAL REVIEW PLAYS IN EVALUATING THE GOVERNMENT'S DEMANDS FOR SECRECY.

a. Excessive Secrecy Imposes Significant Social Costs on Society.

Amici recognize the paramount importance of protecting our national safety. But *amici* respectfully suggest that government transparency is not an enemy of those efforts. Rather, an informed citizenry is one of our nation's highest ideals and is essential for improving the quality of government decisionmaking. In times of war or national crisis, the public's role in governance is especially critical. As Justice Stewart noted, in his oft-quoted concurrence in *New York Times Co. v. United States*:

> In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry – in an informed and critical public opinion which alone can here protect the values of democratic government.

New York Times Co. v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring). Yet, the Government often insists that broad secrecy is necessary to protect security.

While there is no doubt that there is a social cost to sharing highly sensitive information that could be used by a terrorist, there also are real costs associated with keeping unnecessary secrets. As the Director of the Information Security Oversight Office (ISOO), the governmental agency responsible to the President for policy oversight of

the government-wide security classification system and the National Industrial Security Program,[3] explains:

> Classification, of course, can be a double-edged sword. Limitations on dissemination of information that are designed to deny information to the enemy on the battlefield can increase the risk of a lack of awareness on the part of our own forces, contributing to the potential for friendly fire incidents or other failures. Similarly, imposing strict compartmentalization of information obtained from human agents increases the risk that a Government official with access to other information that could cast doubt on the reliability of the agent would not know of the use of that agent's information elsewhere in the Government. Simply put, secrecy comes at a price.[4]

That price includes undermining the legitimacy of government actions,[5] reducing accountability,[6] hindering

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[3] *See* About ISOO, http://www.archives.gov/isoo/about_isoo/about_isoo.html) (last visited July 27, 2005).

[4] *Emerging Threats: Overclassification and Pseudo-classification: Hearing Before the Subcomm. on Nat'l Sec., Emerging Threats, and Int'l Relations of the H. Comm. on Gov't Reform*, 109th Cong. (2005) (statement of J. William Leonard, Director, ISOO, Nat'l Archives and Records Admin.), http://reform.house.gov/UploadedFiles/ISOO Leonard testimony final 3-2-05 hearing.pdf.

[5] *See, e.g., Report of the Comm'n on Reducing and Protecting and Reducing Gov't Secrecy*, S. Doc. No. 105-2, at 8 (1997), http://www.access.gpo.gov/congress/commissions/secrecy/ ("[T]he failure to ensure timely access to government information, subject to carefully delineated exceptions, risks leaving the public uninformed of decisions of great consequence. As a result, there may be a heightened degree of cynicism and distrust of government, including in contexts far removed from the area in which the secrecy was maintained.").

[6] *See, e.g., ACLU v. Dep't of Defense*, 339 F. Supp. 2d 501, 504-05 (S.D.N.Y. 2004) (ordering government to process records under FOIA concerning detainees abroad: "The information plaintiffs have requested are matters of significant public interest. Yet, the glacial pace at which defendant agencies have been responding to plaintiffs' requests shows an indifference to the commands of FOIA, and fails to afford accountability of government that the act requires. If the

(Continued on following page)

critical technological and scientific progress,[7] interfering with the efficiency of the marketplace,[8] and breeding paranoia.[9]

Indeed, this is the lesson of the inquiries concerning the September 11 attacks on the United States: better information dissemination will empower the public and enable agencies to better protect national security. It was directly addressed by Eleanor Hill, Staff Director, Joint House-Senate Intelligence Committee Investigation into September 11 Attacks, who explained in a Staff Statement summarizing the testimony and evidence,

> [T]he record suggests that, prior to September 11th, the U.S. intelligence and law enforcement communities were fighting a war against terrorism largely without the benefit of what some would call their most potent weapon in that effort: an alert and committed American public.

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documents are more of an embarrassment than a secret, the public should know of our government's treatment of individuals captured and held abroad.").

[7] *See, e.g.*, Nat'l Acad. of Sciences, *Seeking Security: Pathogens, Open Access, and Genome Databases* 54-57 (2004), http://www.nap.edu/books/0309093058/html/52.html ("[A]ny policy stringent enough to reduce the chance that a malefactor would access data would probably also impede legitimate scientists in using the data and would therefore slow discovery. . . . It is possible that the harm done during a process of negotiating such an agreement – through building walls of mistrust between peoples – would be greater than the benefit gained through the sense of security that such a regime might provide. . . . There is some concern that restricting access to this information might lead to a situation in which the mainstream scientific community is unaware of dangers that may threaten us.").

[8] *E.g.*, Aaron Edlin & Joseph E. Stiglitz, *Discouraging Rivals: Managerial Rent-Seeking and Economic Inefficiencies*, 85 Am. Econ. Rev. 1301 (1995).

[9] *See* Kennedy Assassination Records Review Bd., *Final Report* 1 (1998), http://www.archives.gov/research/jfk/review-board/report/ ("30 years of government secrecy relating to the assassination of President John F. Kennedy led the American public to believe that the government had something to hide.").

> One needs look no further for proof of the latter point than the heroics of the passengers on Flight 93 or the quick action of the flight attendant who identified shoe bomber Richard Reid.[10]

This conclusion is echoed in the Report of the National Commission on Terrorist Attacks on the United States ("9/11 Commission"), which includes only one finding that the attacks on the World Trade Center and the Pentagon might have been prevented. According to the interrogation of the hijackers' paymaster, Ramzi Binalshibh, if the organizers – particularly Khalid Sheikh Mohammed – had known that the so-called 20th hijacker, Zacarias Moussaoui, had been arrested at his Minnesota flight school on immigration charges, then Bin Ladin and Mohammed would have called off the 9/11 attacks.[11] News of that arrest might also have alerted the FBI agent in Phoenix who warned of Islamic militants in flight schools in a July 2001 memo. Instead that memo vanished into the FBI's vaults in Washington and was not connected to Moussaoui in time to prevent the attacks.[12] The Commission's wording on this issue is important: only "publicity . . . might have derailed the plot."[13] Disclosure of security-related information may reduce risk by alerting the public to threats and

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[10] *Intelligence Community's Response to Past Terrorist Attacks Against the United States from February 1993 to September 2001: Hearing Before the J. H./S. Intelligence Comm.*, 107th Cong. (2002) (Joint Inquiry Staff Statement, Eleanor Hill, Staff Dir.), http://intelligence.senate.gov/0210hrg/021008/hill.pdf.

[11] National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, 247, 276 & 541 n. 107 (2004), http://www.9-11commission.gov/.

[12] *See Joint Investigation Into September 11th: Hearing Before the J. H./S. Intelligence Comm.*, 107th Cong. (2002), http://intelligence.senate.gov/0209hrg/020924/hill.pdf (Joint Inquiry Staff Statement, Eleanor Hill, Staff Dir., on "The FBI's Handling of the Phoenix Electronic Communication and Investigation of Zacarias Moussaoui Prior to September 11, 2001.")

[13] *The 9/11 Commission Report*, *supra* note 11, at 276.

enabling better-informed responses from both local and federal agencies.

The rationale behind the nation's central openness law, the Freedom of Information Act, 5 U.S.C. § 552, reflects the notion that sharing information with the public will help, not harm, society. The FOIA mandates complete openness, with only carefully delineated exemptions from that general rule. *Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976). In enacting the law, Congress sought to "enable the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities," *Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 17 (1974) (internal quotes omitted), and to prevent the damage that pervasive secrecy in government agencies did to public confidence in their Government. *See* S. Rep. No. 813 (1965), as reprinted in S. Comm. on the Judiciary, *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles*, S. Doc. No. 93-82, at 45 (1974) [hereinafter *FOIA Sourcebook*] ("A government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.").

The benefit recognized by Congress is that informed democratic participation ensures that elected officials make decisions in our national security interest. As Luther Gulick, a high-level Roosevelt administration official during World War II, observed, despite the apparent efficiencies of totalitarian political organizations, democracy and expressive freedom gave the United States and its democratic allies an important competitive advantage because public debate encouraged wise policy choices.[14]

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[14] Cass R. Sunstein, *Why Societies Need Dissent* 8 (2003) (citing Luther Gulick, *Administrative Reflections from World War II* 121-29 (1948)).

And the necessary corollary to this point – that secrecy can interfere with informed decisionmaking in areas of foreign and national security policy – is true as well. For example, as Senator Daniel Patrick Moynihan concluded in *Secrecy: The American Experience*, the Cold War and related arms race were greatly exacerbated by the secrecy imposed by the military establishment. *Id.* at 154-77 (1998).

Overclassification and unneeded secrecy also undermine the effort to keep truly sensitive information secret, "[f]or when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or careless, and to be manipulated by those intent on self-protection or self-promotion." *New York Times Co.*, 403 U.S. at 729 (Stewart, J., concurring). Indeed, this is the same conclusion reached by the ISOO in its 2002 Report to the President:

> Much the same way the indiscriminate use of antibiotics reduces their effectiveness in combating infections, classifying either too much information or for too long can reduce the effectiveness of the classification system, which, more than anything else, is dependent upon the confidence of the people touched by it. While there is always a temptation to err on the side of caution, especially in times of war, the challenge for agencies is to similarly avoid damaging the nation's security by hoarding information.[11]

Moreover, government transparency is a central principle of democracy. As Secretary of Defense Donald Rumsfeld recognized in a recent op-ed in the *Wall Street Journal*, "[a]s more citizens gain access to new forms of information, to new ways of learning of the outside world, it will be that much more difficult for governments to cement their [anti-democratic] rule by holding monopolies on news and commentary." Donald Rumsfeld, *War of the*

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[11] ISOO, *Report to the President* 7 (2002), http://www.archives.gov/isoo/reports/2002-annual-report.pdf.

Worlds, Wall St. J., July 18, 2005, at A12. This is consistent with the international consensus that the right to know about the activities of government is a fundamental human right.[16]

b. Secrecy Has Grown Exponentially Over the Last Four Years and Government Officials Admit That Much of it is Unnecessary.

Over the past four years there has been a dramatic upsurge in government secrecy. Classification has multiplied, reaching an all-time high of 15.6 million classification actions in 2004, nearly double the number in 2001.[17] Moreover, the cost of the program has skyrocketed from an estimated $4.7 billion in 2002 to $7.2 billion in 2004.[18]

Officials from throughout the military and intelligence sectors have admitted that much of this classification activity is unnecessary. Secretary of Defense Donald Rumsfeld recently acknowledged the problem of overclassification: "I have long believed that too much material is classified across the federal government as a general rule. . . . "[19] The extent of over-classification is significant. Under repeated questioning from members of Congress at a 2004 hearing concerning over-classification, Deputy

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[16] *See* Universal Declaration of Human Rights, art. 19, Dec. 10, 1948, UN Resolution 217A(III); African Charter on Human and Peoples' Rights, art. 9, June 26, 1981; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950; American Convention on Human Rights, art. 13, Nov. 22, 1969; Inter-American Comm'n on Human Rights, Declaration of Principles on Freedom of Expression, para. 4, Oct. 19, 2000.

[17] ISOO, *2004 Report to the President* 3 (2005), http://www.archives.gov/isoo/reports/2004-annual-report.pdf.

[18] ISOO, *2004 Report on Cost Estimates for Security Classification Activities for 2004* 3 (2005), http://www.archives.gov/isoo/reports/2004-cost-report.pdf; ISOO, *2001 Report to the President* 9 (2002), http://www.archives.gov/isoo/reports/2001-annual-report.pdf.

[19] Donald Rumsfeld, *War of the Worlds*, Wall St. J., July 18, 2005, at A12.

Secretary of Defense for Counterintelligence and Security Carol A. Haave eventually conceded that approximately 50 percent of classification decisions are over-classifications.[20] These opinions echoed that of now-CIA Director Porter Goss, who told the 9/11 Commission, "we overclassify very badly. There's a lot of gratuitous classification going on, and there are a variety of reasons for them."[21]

Former Solicitor General of the United States Erwin Griswold, who led the government's fight for secrecy in the Pentagon Papers case, acknowledged some of the reasons:

> It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but with governmental embarrassment of one sort or another. There may be some basis for short-term classification while plans are being made, or negotiations are going on, but apart from details of weapons systems, there is very rarely any real risk to current national security from the publication of facts relating to transactions in the past, even the fairly recent past.[22]

At the same time that unnecessary classification has surged, a number of new laws have been enacted post-September 11 creating new categories of secret information. These include, among others: the critical

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[20] *Subcommittee on National Security, Emerging Threats and International Relations of the House Committee on Gov't Reform Hearing*, 108th Cong. (2004) (testimony of Carol A. Haave), http://www.fas.org/sgp/congress/2004/082404transcript.pdf; *see id.* (Testimony of J. William Leonard, Director of ISOO) ("It is no secret that the government classifies too much information.").

[21] *9/11 Commission Hearing*, (Testimony of then Chair of the House Permanent Select Committee on Intelligence, now Director of Central Intelligence, Porter Goss) (2003), http://www.9-11commission.gov/archive/hearing2/9-11Commission_Hearing_2003-05-22.htm#panel_two.

[22] Erwin N. Griswold, *Secrets Not Worth Keeping: The courts and classified information*, Wash. Post, Feb. 15, 1989, at A25.

infrastructure information provisions of the Homeland Security Act of 2002, 6 U.S.C.S. § 133 (2005); the so-called gag order provisions of Section 215 of the Patriot Act, 50 U.S.C.S. § 1861 (2005); and the revisions to the sensitive security information provisions of the Air Transportation Security Act. 49 U.S.C.S. §§ 114(s), 40119 (2005).

The government also has expanded its use of the "mosaic" theory of intelligence gathering to a level never before seen, perhaps finally falling down the "'slippery slope'" "lurking in the background of the [mosaic] theory" that the Third Circuit recognized in *American Friends Service Committee v. Department of Defense*, 831 F.2d 441, 445 (3d Cir. 1987). The mosaic theory rests on the claim that innocuous bits of information can be combined to pose a risk to national security. Several courts have highlighted the risks attendant to the theory. For example, in *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 709 (6th Cir. 2002), the court struck down the blanket closure of immigration hearings and cautioned:

> The Government could use its 'mosaic intelligence' argument as a justification to close any public hearing completely and categorically, including criminal proceedings. The Government could operate in virtual secrecy in all matters dealing, even remotely with 'national security,' resulting in a wholesale suspension of First Amendment rights.

And, as in this case, the government appears to be expanding use of a potentially more powerful litigation tactic – motions to dismiss lawsuits on the basis of state secrets privilege. "In the twenty-three years between the decision in [*United States v. Reynolds*, 345 U.S. 1 (1953)] and the election of Jimmy Carter, in 1976, there are four reported cases where the government invoked the privilege. Between 1977 and 2001, there are a total of fifty-one reported cases where courts ruled on invocation of the

privilege."[23] In the three and one-half years since then, there have been at least six district court decisions and seven court of appeals decisions concerning the privilege that resulted in written opinions.[24] Because it prevents any judicial inquiry into the merits of the underlying claims, invocation of state secrets privilege has been a successful litigation tactic.

The government does not have an incentive to check abuse of the privilege. In cases such as Ms. Edmonds', the termination of the lawsuit ends public inquiry into allegations of mismanagement or malfeasance, as well as any governmental liability. The Government has an interest instead in preserving such secrecy; it permits the Government to pursue unimpeded its aims.

The government's penchant for overclassification is particularly troubling in the context of this case, where it is being used not only to retroactively classify information that already is widely disseminated, but also to prevent a person from exercising the right to bring a lawsuit to vindicate her claim that she was wrongfully discharged in violation of her First and Fourth Amendment rights and that her rights under the Privacy Act were violated.

c. Meaningful Judicial Review of Government Secrecy is Necessary to Prevent Overreaching.

When there is an absence of internal and external checks against government misconduct, the judiciary is critically necessary to protect against overreaching.

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[23] William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 Pol. Sci. Q. 85, 101 (2005). Indeed, it has proven difficult to ascertain the breadth of circumstances when the state secrets privilege has been invoked. *See id.* at 111 (describing lack of any success in efforts to obtain policy guidance on use of state secrets privilege from three dozen agencies and their sub components).

[24] Based on a search in LexisNexis Academic Universe conducted on September 2, 2005.

Our nation's experience when extreme secrecy has been invoked in the past is that secrecy can stem from many motives – some legitimate and some possibly illegitimate. The government has no independent incentive to separate out the illegitimate incentives. This certainly is the lesson of cases such as *Korematsu v. United States*, 323 U.S. 214 (1944), and *New York Times Co.*, 403 U.S. 713, which demonstrate the danger of a doctrine of deference that precludes dispositive counterarguments and prompts judges to decline substantive review of agencies' positions.

Korematsu concerned an order that directed the exclusion from the West Coast of all persons of Japanese ancestry. It was held constitutional. In that case, the Court's finding of "military necessity" was based on the representation of government lawyers that Japanese Americans were *committing espionage and sabotage* by signaling enemy ships from shore. Documents later released under FOIA revealed that government attorneys had suppressed key evidence and authoritative reports from the Office of Naval Intelligence, the FBI, the Federal Communications Commission, and Army intelligence that flatly contradicted the government claim that Japanese Americans were a threat to security. *Korematsu v. United States*, 584 F. Supp. 1406, 1416-19 (N.D. CA 1984). Had the court required an explanation of the evidence to support the central rationale for interning thousands of Japanese Americans, it would have learned that there was no evidence and would have been able to discern what likely was the true rationale for the policy. The complete deference granted to the government in *Korematsu* – without any effort to ensure the veracity of the government's claims – undermined accountability.

New York Times Co. involved an effort to enjoin *The New York Times* and *Washington Post* from publishing a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy" ("Pentagon Papers"). As with *Korematsu*, review of the materials shielded by government secrecy demonstrates that the motivation behind the secrecy was not protection of national security. The Pentagon Papers described a series of misrepresentations and

poor policy decisions concerning the Vietnam War. They were improperly leaked. As former Solicitor General Erwin Griswold eventually admitted: "I have never seen any trace of a threat to the national security from publication. Indeed, I have never seen it suggested that there was such an actual threat."[28] The Supreme Court denied the Government's efforts to enjoin publication by newspapers. Had the Pentagon Papers not been leaked, there would have been no First Amendment clash to resolve – secrecy for the purpose of covering up government misrepresentations would have triumphed.

Even *United States v. Reynolds*, 345 U.S. 1 (1953), the case in which this Court endorsed the state secrets privilege, illustrates the tendency of government to give in to the lure of secrecy and overly deferential judicial review. *Reynolds* was a tort lawsuit brought by widows of three civilians killed in a crash of an Air Force plane. The plaintiffs sought in discovery the official accident investigation report. The District Court ordered the government to produce the document and when the Air Force refused, entered an order finding in the plaintiffs' favor on the merits of the suit. The Court of Appeals affirmed the ruling. The Supreme Court reversed.

In 2000, the daughter of one of the deceased civilians obtained the declassified accident investigation report when researching the incident on the Internet. The claim of privilege in 1953 was based on the fact that the aircraft was involved in a "confidential mission" and "carried confidential equipment." *Herring v. United States*, No. 03-CV-5500-LDD, 2004 U.S. Dist. LEXIS 18545, at *17 (E.D. Pa. Sept. 10, 2004). Today we know that the accident report at issue in Reynolds contained no details about secret military equipment. *Id.* at *26 (noting that the accident report does not refer to newly developed or secret electronic equipment).

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[28] Griswold, *supra* note 22, at A25.

While it is likely that there always will be some sensitive security information in a case involving a secret military mission, just as in any case relating to an employee of a military, intelligence, or law enforcement agency, such claims should not be simply taken on faith. Had the Supreme Court permitted the lower court to require an *in camera* review of the accident investigation report, it would have enabled the court to ask the military to explain its rationale. Even if the court would have upheld the state secrets privilege on that explanation, the decision to extinguish a plaintiff's legal rights would have been based on the actual rationale for the secrecy, and not on a vague claim that the matter involved a secret mission. Certainly, the need to explain itself to a federal court has a salutary effect on the actions of the government.

Similarly, Ms. Edmonds' case raises signals that the government may be overreaching. First, there is evidence that there may be some legitimacy to Ms. Edmonds' claims. The Justice Department's Inspector General concluded that Ms. Edmonds' allegations "were, in fact, the most significant factor in the FBI's decision to terminate her services." DOJ OIG Report, *supra* note 2, at 31. In addition, Ms. Edmonds' allegations triggered widespread concern by Members of Congress and the acknowledgment by the FBI that some of Ms. Edmonds' allegations "were not unfounded." Petr.'s Br. at 3.

Second, much of the information surrounding Ms. Edmonds' allegations and the government's response to them was in the public domain and widely disseminated *before* the government engaged in a retroactive classification as a predicate for invoking the state secrets privilege. Despite the retroactive classification, no effort was made to regain control over the information. In addition, the publicly-released Justice Department Inspector General's report included many details of Ms. Edmonds' employment and allegations.

These facts send a danger signal that strongly suggests that the classification on which the government rests its assertion of the state secrets privilege would not have

occurred but for the Government's desire to use the state secrets privilege as a litigation tactic to deprive Ms. Edmonds of the right to prove in court what the Inspector General has found – namely, that her allegations were the "most significant factor in the FBI's decision to terminate her services."

In cases such as these, the courts are the only branch that can act as a check against government overreaching. Congress is limited in terms of the breadth, speed, and frequency with which it can perform oversight. Yet, the lower courts act as though they are disempowered because classified information may be involved in the case. There is no doubt that any individual working in a job like Ms. Edmonds' – an FBI translator who translated intercepted communications – would come into contact with classified information. Yet, that alone does not mean that Ms. Edmonds should be denied her day in court. Nonetheless, the Government's position in this case sends a clear message to all government personnel who work on national security matters – there is no protection for you if you blow the whistle on wrongdoing.

Acquiescence by the judiciary to such overbroad assertions of secrecy is not mandated by our constitutional system. The U.S. Constitution itself contains only one specific mention of secrecy, in Article I, Section 5, which states:

> Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

U.S. Const. art. I, § 5. Thus, the Constitution compels publicity for Congress's proceedings and accountability for its actions, with secrecy as the exception that proves the rule. The Executive's power to keep information secret is not mentioned in the Constitution, but is derived from the Article II powers vested in the President as

commander-in-chief and as maker of treaties (with the advice and consent of the Senate).[26]

The constitutional system of checks and balances does not permit the executive branch to act beyond the accountability of the judiciary. As the Supreme Court reminded the executive branch when it mandated due process for enemy combatants, "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi v. Rumsfeld*, 542 U.S. 507, 603 (2004) (O'Connor, J., plurality opinion).

Congress also has acknowledged the judiciary's constitutional role in policing executive claims of secrecy. In a definitive pronouncement on the issue, Congress overturned *EPA v. Mink*, 410 U.S. 73 (1973), with the 1974 amendments to the FOIA, 5 U.S.C. § 552. President Ford vetoed the amendments based on his view that it would be unconstitutional for a judge to decide whether a record was properly classified.[27] Congress overrode that veto, ensuring that the FOIA explicitly provides for judges to conduct *in camera* review of records despite the Government's assertion of national security. This authority was given to judges to safeguard against arbitrary, capricious, and myopic use of the awesome power of the classification stamp by the government bureaucracy. S. Rep. No. 93-854 (1974), as reprinted in *FOIA SourceBook*, at 183.

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[26] U.S. Const. art. II, § 2. These significant presidential powers are balanced by congressional authority to "provide for the common Defence," *id.* art. I, § 8, cl. 1; "declare War . . . and make Rules concerning Captures on Land and Water," *id.* cl. 11; "make Rules for the Government and Regulation of the land and naval Forces," *id.* cl. 14; advise in and consent to the making of treaties, *id.* art. II, § 2, cl. 2; "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by th[e] Constitution in the Government of the United States," *id.* art. I, § 8, cl. 18; and insist that "[n]o money shall be drawn from the Treasury, but in consequence of Appropriations made by Law." *Id.* § 9, cl. 7.

[27] Veto Message from President Ford to the House of Representatives (Oct. 17, 1974), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB142/101774%20Veto%20Message.pdf.

Nor has Congress made any effort to preclude claims such as those brought by Ms. Edmonds. *See Webster v. Doe*, 486 U.S. 592, 603 (1988). Indeed, *Webster* admonished that a "serious constitutional question" would arise if consideration of Doe's constitutional claims were foreclosed. *Id.* It follows that executive branch efforts to proscribe judicial review of such claims must be examined with great care. *See, e.g., Reynolds*, 345 U.S. at 9-10 ("[J]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."); *In re United States*, 872 F.2d 472, 475 (D.C. Cir. 1989) ("[A] court must not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role."). This failure is a serious one. Before accepting the executive branch's claim of state secrets privilege, the court must scrutinize the basis for the claim.

The courts are certainly competent to scrutinize the need for secrecy and to use the substantial array of procedures available to a court to permit the use of classified information without its revelation to the public. The Supreme Court's intervention is necessary to make clear to the lower courts that an executive claim of secrecy does not render a matter non-justiciable. Instead, courts are to use all of the tools available to fulfill their constitutional duty to resolve disputes.

Since *Reynolds*, unquestioning judicial acquiescence to assertions of the state secrets privilege has been the rule rather than the exception, despite *Reynolds* clear direction that courts have an important role to play in assessing the Government's privilege claims. For this reason, this Court's intervention is needed to explain to lower courts what that scrutiny involves.

CONCLUSION

For the foregoing reasons and the reasons set forth in Petitioner's Brief, the Court should grant a writ of certiorari.

DATED: October 10, 2005

Respectfully submitted,

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No. 05-190

In the

Supreme Court of the United States

SIBEL EDMONDS,

Petitioner,

v.

DEPARTMENT OF JUSTICE, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, THE ASSOCIATED PRESS, BLOOMBERG NEWS, CABLE NEWS NETWORK LP, LLLP, DAILY NEWS L.P., LOS ANGELES TIMES COMMUNICATIONS LLC, THE NEW YORK TIMES CO., REUTERS AMERICA LLC, SOCIETY OF PROFESSIONAL JOURNALISTS, AND THE WASHINGTON POST CO. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, described more fully in Appendix A, are journalists who report on matters of public concern, and journalism organizations that represent journalists. This case concerns an issue critical to the media specifically and the public in general: whether the public has a presumptive right of access to appellate court proceedings of significant public importance.

As cases stemming from the War on Terrorism move through our courts, the distinction between the public interest in access to criminal versus civil cases becomes less relevant. Some of the more important developments are occurring in the civil context, such as the suits brought against the government by individuals implicated in the anthrax attack investigation, espionage investigations at nuclear facilities, and, in the present case, allegations of improper activities within the Federal Bureau of Investigation.

It is imperative that this Court accept review to clarify that the presumptive public right of access applies to these controversies.

Each of the amici parties has an interest in protecting and preserving the news media's ability to report to the public on matters of public concern.

STATEMENT OF FACTS

Amici rely on the summary of the facts presented by petitioner, but emphasize that the facts relevent to this brief are those involving the closure of the appellate proceeding on

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amici curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief. Written consent of all parties to the filing of the brief *amici curiae* has been filed with the Clerk pursuant to Sup. Ct. R. 37.3(a).

April 21, 2005.

The day before oral arguments were to be held, the U.S. Circuit Court of Appeals for the District of Columbia announced that the argument would be sealed from the press and public, despite the fact that neither party had moved for closed arguments and both parties had filed public briefs. *See Petition for Certiorari* at 13. The court then rebuffed two motions for access to the proceedings filed by a news media coalition and public interest groups, again with no explanation or justification of the need for closure. App. 3a.

SUMMARY OF ARGUMENT

Amici argue that the second question presented for review, concerning the denial of public and press access to the proceedings, merits review by this Court. A number of federal and state appellate courts recognize a presumptive right of access in circumstances similar to or — given the important public interests at stake here — even less important than in the present case. Recognition of a *presumptive* right, of course, does not settle the issue of access, but instead allows closure if the court identifies a compelling governmental interest that will be jeopardized and narrowly tailors a closure order to satisfy that interest. Other federal circuit courts manage to operate under such a standard, even in cases involving state secrets in terrorism investigations.

In *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555 (1980), and its progeny, this Court looked in part to public policy arguments when it established the First Amendment right-of-access framework for criminal trials. In the 25 years since the Court issued *Richmond Newspapers*, a plethora of federal and state appellate courts have looked to those same public policy arguments in finding that the right of access also applies to civil litigation. Indeed, a number of courts have

specifically found a right of access to appellate oral arguments where the cases involve national security issues.

This Court's decisions make clear that a presumption of access applies to criminal cases, and that a court can overcome that presumption only by allowing the public an opportunity to be heard before closure and then issuing specific findings of fact showing that a compelling government interest justifies denying access and that the denial of access is narrowly tailored to achieve that goal. The presumption of openness and procedural safeguards have been extended to civil cases as well.

In this case, the Court of Appeals did not acknowledge the public's right of access to attend the appellate argument. It issued no findings of fact that attempted to justify its closure of the court and its decision to disregard the constitutional right of access. And it did not explain how its remedy — complete closure of the courtroom — constituted a narrowly tailored solution to the situation.

The D.C. Court of Appeals is attempting to allow the closing of broad categories of civil litigation from the public, and by doing so it has abridged the public's First Amendment rights.

ARGUMENT

I. The important public policy concerns underlying this Court's recognition of a First Amendment right of access in the criminal trial context are even more evident in the present case.

This Court's review is essential in the present case so that lower courts will know they cannot completely deny access to an appellate proceeding in a civil case of great public importance without justifying that closure in written findings that identify a compelling governmental interest and limit closure to the extent necessary to protect that interest.

In establishing the public's presumptive constitutional right of access to attend criminal trials, discussed *infra* at II, this Court has discussed the public policy reasons supporting access. Those reasons include, but are not limited to, the following: that openness ensures the accountability of our justice system, improves the functioning of a trial, provides an outlet for public concern, improves the public's understanding and acceptance of the judicial system, improves informed public debate, fosters an appearance of fairness, and permits the public to serve as a check on the judicial process.

These public policy factors also favor a presumptive right of access to civil appellate arguments. For better or worse, many of the most critical public policy battles are now fought through civil litigation. The front pages of America's newspapers are filled with stories about whistleblower litigation against employers, product liability litigation against cigarette companies and automobile manufacturers, toxic tort litigation against chemical manufacturers, class action lawsuits concerning breast implants, and wrongful death lawsuits against people acquitted of criminal murder charges. This phenomenon is hardly new. As this Court noted in discussing the history of civil rights litigation, "[I]n some civil cases the

public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases." *Gannett Co. v. DePasquale*, 443 U.S. 368, 387 n.15 (1979).

Furthermore, most of the concerns that justify closure of trial court proceedings — such as pretrial publicity that will influence jurors or interfere with the fair trial rights of a criminal defendant — do not apply to appellate proceedings.

Cases against the federal government that include claims under the Privacy Act, 5 U.S.C. § 552(a), such as the present case, present an even greater issue of public importance. The plaintiff alleges that the government, in defending its actions against charges of retaliation for exposing espionage within the FBI, released information to the public that it was not allowed to release under the Act. Such Privacy Act claims have been among the most controversial court actions in recent years, covering topics ranging from wrongful termination to the anthrax attacks and espionage at Los Alamos labs. These claims go to the heart of government accountability to the people because they involve both government statements to defend its own actions and individual claims of illegal retaliation by the government.

If the U.S. Court of Appeals for the District of Columbia circuit's decision to close the courtroom with no opportunity to be heard and no written finding justifying closure is allowed to stand, members of the public could be excluded from any broad category of cases that would facilitate public review of government conduct and would never understand when the government's interest in protecting state secrets outweighs the public's right to access. Under the Court of Appeals' reasoning, Circuit Courts need not articulate the reasons for denying the public's First Amendment right of access to civil appellate proceedings that concern fundamental issues of governance.

II. This Court recognizes the public's First Amendment right of access to criminal cases.

This Court has held that the public has a First Amendment right of access to attend criminal trials and related criminal proceedings. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982) ("The Court's recent decision in *Richmond Newspapers* firmly established for the first time that the press and general public have a constitutional right of access to criminal trials.")

In subsequent cases that clarified when the presumption of access attaches, the Court first "considered whether the place and process have historically been open to the press and the general public." *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 8 (citing *Globe Newspaper*, 457 U.S. at 605 and *Richmond Newspapers*, 448 U.S. at 589). Second, it "considered whether public access plays a significant positive role of the functioning of the particular process in question." *Id.* (citing *Globe Newspaper*, 457 U.S. at 606).

In *Richmond Newspapers* and its progeny, this Court has established procedural requirements that must be carried out before closing a courtroom. *See* generally C. Thomas Dienes et al., NEWSGATHERING AND THE LAW § 2-3 (2d ed. 1999) (describing the necessary procedural steps that trial courts must take under the various U.S. Supreme Court access decisions).

"[F]or a case-by-case approach to be meaningful, representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'" *Globe Newspaper*, 457 U.S. at 609 n.25 (citing *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (Powell, J., concurring)). For the "opportunity to be heard" to be meaningful, some notice must be provided before the trial court closes a

courtroom. *See, e.g., United States v. Cojab*, 996 F.2d 1404, 1408 (2d Cir. 1993) (holding that a hearing concerning closure cannot be held before the public has notice that the hearing will take place so that members of the public will have an opportunity to be heard).

For a court to close a proceeding, it must issue specific findings of fact that "closure is essential to preserve higher values [than the constitutional right of access] and is narrowly tailored to serve that interest." *Press-Enterprise II*, 478 U.S. at 13-14. One reason that this procedural component is so important is so "that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise Co. v. Superior Court ("Press-Enterprise I")*, 464 U.S. 501, 510 (1984).

III. The constitutional right of access is equally important in civil litigation as in criminal litigation.

A. The factors that led to a right of access to criminal proceedings are identical for civil proceedings.

This Court has not ruled on whether the right of access applies to civil cases. Nevertheless, its opinions have discussed the similar historical background of both criminal and civil litigation and the similar public policy factors at issue in both criminal and civil litigation.

In *Gannett Co. v. DePasquale*, this Court noted the striking similarities between the history of the public's right to attend civil and criminal trials:

> For many centuries, both civil and criminal trials have traditionally been open to the public. As early as 1685, Sir John Hawles commented that open proceedings were necessary so "that truth may be discovered

> in civil as well as criminal matters" . . . English commentators also assumed that the common-law rule was that the public could attend civil and criminal trials without distinguishing between the two.
>
> The experience in the American Colonies was analogous. From the beginning, the norm was open trials. Indeed, the 1677 New Jersey Constitution provided that any person could attend a trial whether it was "civil *or* criminal." . . . Similarly, the 1682 and 1776 Pennsylvania Constitutions both provided that "all courts shall be open."
>
> . . .
>
> Indeed, many of the advantages of public criminal trials are equally applicable in the civil trial context. While the operation of the judicial process in civil cases is often of interest only to the parties in the litigation, this is not always the case. *See, e. g., Dred Scott v. Sandford*, 19 How. 393 [60 U.S. 393 (1856)]; *Plessy v. Ferguson*, 163 U.S. 537 [(1896)]; *Brown v. Board of Education*, 347 U.S. 483 [(1954)]; *University of California Regents v. Bakke*, 438 U.S. 265 [(1978)]. Thus, in some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases.

Gannett, 443 U.S. at 386-87 n.15 (internal citations omitted).

Since the issuance of *Richmond Newspapers* one year after *Gannett*, many members of this Court have noted that both the historical and functional component of the right-of-access framework lead to the conclusion that civil and criminal proceedings should be treated alike. *Richmond Newspapers*, 448 U.S. at 580 n.17 ("Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal

trials have been presumptively open"); *Id.* at 599 (Stewart, J., concurring) ("The First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal."); *Press-Enterprise II*, 478 U.S. at 27 (Stevens, J., dissenting) ("[T]he logic of the Court's access right extends beyond the confines of the criminal justice system to encompass proceedings held on the civil side of the docket . . .").

Many lower courts have reached the conclusion that the constitutional right of access to criminal proceedings applies to civil proceedings because the same rationales pertain. *See, e.g., Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); *Brown & Williamson Tobacco Corp. v. Federal Trade Commission*, 710 F.2d 1165 (6th Cir. 1983); *Westmoreland v. Columbia Broadcasting System, Inc.*, 752 F.2d 16 (2d Cir. 1984).

As with criminal proceedings, access to civil proceedings "plays a particularly significant role in the functioning of the judicial process and the government as a whole." *Publicker*, 733 F.2d at 1070 (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 606). "Public access to civil trials enhances the quality and safeguards the integrity of the factfinding process,' 'fosters an appearance of fairness,' heightens 'public respect for the judicial process,' and 'permits the public to participate in and serve as a check upon the judicial process — an essential component in our structure of self-government.'" *Id.*

Additionally, civil cases often involve issues that are crucial to the public — whistleblower actions against large corporations, discrimination class actions, mass tort litigation — all concern issues that affect the public at large because they contain allegations of wrongdoing that have a broad effect. Public scrutiny is needed to expose any unjust acts committed by the parties, and to ensure that the courts are

performing their role as prescribed. "The concern of Justice Brennan that secrecy eliminates one of the important checks on the integrity of the system applies no differently in a civil setting. In either the civil or the criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption." *Brown & Williamson*, 710 F.2d at 1179.

Finally, the principle underlying the First Amendment right of access that "a major purpose of that Amendment was to protect the free discussion of governmental affairs," applies to both criminal and civil proceedings. *Westmoreland*, 752 F.2d at 22 (citing *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). When courts close civil proceedings that involve allegations of government misconduct, they deprive the public of information needed to evaluate governmental affairs and weigh in if needed. When courts are sealed, the public may suspect the worst and lose faith in their government simply because they are prohibited access. *See Richmond Newspapers*, 448 U.S. at 572 ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.").

B. The rationale behind a presumptive right of access applies to appellate oral arguments, even when national security interests are involved.

Courts have extended the constitutional right of access to appellate oral arguments under the same rationale on which this Court premised a right of access to criminal trials. *See, e.g., United States v. Moussaoui*, 65 Fed. Appx. 881, 890, 2003 WL 21076836 (4th Cir. 2003) (Appellate oral arguments "have historically been open to the public, and the very considerations that counsel in favor of openness of criminal trial support a similar degree of openness in appellate proceed-

ings."); *Doe v. United States*, 253 F.3d 256 (6th Cir. 2001); *In re Grand Jury Proceedings*, 983 F.2d 74, 75 (7th Cir. 1992) (refusing to seal appellate arguments on the basis that "[w]hat happens in the halls of government is presumptively open to public scrutiny.").

In *Moussaoui*, the Fourth Circuit rejected the government's request to completely seal oral arguments to protect classified information to protect the interests of the press and public. The court explained: "The value of openness in judicial proceedings can hardly be overestimated. 'The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.'" *Moussaoui*, 65 Fed. Appx. at 885 (citing *Union Oil Co. v. Leavell*, 220 F.3d 562, 578 (7th Cir. 2000)). *See also In re Grand Jury Proceedings*, 983 F.2d at 75; *Doe*, 253 F.3d at 262.

The public interest in access to appellate arguments is at least as high as in access to lower court proceedings. At the appellate level, the lower court's reasoning is reviewed. Publicity ensures that the public can evaluate the merits of each party's position and the appellate court's holding. This scrutiny contributes to the quality and integrity of the appellate process, which is crucial to the preservation of justice. In appellate cases that involve allegations of government wrongdoing, public scrutiny is essential to protect against corruption or incompetence.

C. The procedural safeguards found to be essential in the criminal context also apply to civil appellate proceedings.

In this case, the D.C. Circuit made no attempt to explain

why public access would be denied. However, other circuits have recognized that specific findings are necessary. The U.S. Court of Appeals for the Eleventh Circuit described the type of procedural safeguards that it believed must be put in place before closing a civil proceeding:

> There is nothing in this record that supports the closing of these proceedings to the press and public. The district court did not hold any hearing after proper notice, nor did it enter findings that justify any restrictions on public access to the proceedings. *See Globe Newspaper Co. v. Superior Court*, 102 S. Ct. at 2622, n.25 (the press must be afforded an opportunity to present its case for an open proceeding); *Gannett Co. v. DePasquale*, 443 U.S. at 401 (Powell, J., concurring) (same). *See also* Note, All Courts Shall Be Open: The Public's Right to View Judicial Proceedings and Records, 52 Temp. L.Q. 311, 332 (1979). We commend to the trial courts the same procedure that has been recommended in a fair trial-free press context. *See* ABA, Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press (1976).
>
> Other procedures also might accomplish the purpose. . . . We do not bind the district courts to the formality of any set procedure. But the issue must be squarely confronted and those with various interests must be given the opportunity to be heard.

Newman v. Graddick, 696 F.2d 797, 802 (11th Cir. 1983); *see also Publicker Indus.*, 733 F.2d at 1070 (holding that before a court closes a civil courtroom it must show that a denial serves an important government interest, that no less restrictive way exists to serve that government interest, and that the court has made record findings in order to facilitate meaningful governmental review).

Even when national security is concerned, before closing a proceeding, appellate courts must make specific findings that demonstrate that closure is narrowly tailored to protect a compelling government interest. In *Moussaoui*, to protect the guaranteed "right of access by the public to oral arguments in the appellate proceedings of this court" while preserving national security interests, the Fourth Circuit ordered a bifurcated argument. *Moussaoui*, 65 Fed. Appx. at 890. "Should counsel believe that reference to classified information is necessary, such a discussion will be reserved to the second part of oral argument, which will be conducted in a sealed courtroom." *Id.* To protect the interests of the public and press in the sealed hearing, the court also ordered a release of a redacted transcript of the sealed hearing after the argument concluded.

CONCLUSION

The Court of Appeals ruling ignores the now-well-established public interests affected by any court closure decision. Closing cases that involve allegations of government wrongdoing leads to increased public interest in what takes place behind closed doors, fosters public doubts about the private justice that certain people and entities get in the public courts, harms public debate about the issues involved in the litigation, and perhaps most devastatingly fosters an appearance of unfairness, that the government can close off access to the public courts when it is under fire.

This Court should not allow courts to deny access to civil cases that involve allegations of government wrongdoing with no specific, on-the-record findings, in large part because of the devastating impact that such a holding would have on public confidence in the fairness and accountability of the justice system and the government. The courts must articulate

when the government's interest in protecting state secrets outweighs the public's right to access.

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APPENDIX A

Descriptions of *amici*:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interest of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The American Society of Newspaper Editors is a professional organization of approximately 750 persons who hold positions as directing editors of daily newspapers in the Untied States and Canada. The purposes of the Society include assisting journalists and providing and unfettered and effective press in the service of the American people.

The Associated Press is a global news agency with headquarters in New York City and bureaus in every state and in more than 100 foreign countries. AP gathers and delivers news reports in text, photographic, audio and video formats to thousands of subscribing, print, broadcast and multimedia news organizations and other customers worldwide.

Bloomberg News is a 24-hour global news service with more than 1800 journalists in 108 bureaus around the world, including a fulltime bureau in Washington, D.C. Bloomberg News supplies real time business, financial and legal news to more than 200,000 subscribers world-wide. As a wire service, Bloomberg provides news to more than 350 newspapers globally, and also provides daily radio and television programming throughout the world through its 750 radio affiliates. Bloomberg News also operates eleven 24-hour cable news television outlets globally, which often brings to the public video coverage of important trials in the public

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Daily News L.P. publishes the New York *Daily News*, which is one of the largest newspapers in the United States and has a daily circulation of more than 700,000, primarily in the New York City metropolitan area.

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The Society of Professional Journalists is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists, and protects First Amendment guarantees of freedom of speech and press.

The Washington Post is a newspaper with a nationwide daily circulation of over 738,000 and a Sunday circulation of over 1 million.

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In the Supreme Court of the United States

SIBEL EDMONDS, PETITIONER

v.

DEPARTMENT OF JUSTICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the unavailability of evidence protected by the state secrets privilege required dismissal of this lawsuit.

2. Whether the court of appeals erred in closing oral argument to the public.

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In the Supreme Court of the United States

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DEPARTMENT OF JUSTICE, ET AL.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The judgment (Pet. App. 1a-2a) and pre-argument order (Pet. App. 3a-4a) of the court of appeals are unreported. The opinion of the district court (Pet. App. 5a-33a) is reported at 323 F. Supp. 2d 65.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 2005. The petition for a writ of certiorari was filed on August 3, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Sibel Edmonds brought this suit against the Federal Bureau of Investigation (FBI), the Department of Justice, and four government officials in their official capacities for relief under the Privacy Act

of 1974, 5 U.S.C. 552a, the Administrative Procedure Act, 5 U.S.C. 551-552, 701-706, and the First and Fifth Amendments to the Constitution. The complaint alleges that petitioner performed translation services for the FBI from September 2001 until her contract was terminated in March 2002, and made several reports to FBI management of alleged misconduct within the FBI's translator program between December 2001 and March 2002. In petitioner's view, FBI supervisors and managers failed to address her allegations and retaliated against her for reporting her concerns. Pet. App. 5a-10a.

The government did not answer the complaint. Instead, then-Attorney General John Ashcroft invoked the state secrets privilege in a public declaration that was accompanied by classified declarations of the Attorney General and then-FBI Deputy Director Bruce Gebhardt. Pet. App. 16a-17a. The Attorney General asserted the state secrets privilege over "the information underlying this case, including the nature of the duties of plaintiff or the other contract translators at issue in this case," and explained that "further disclosure of [that] information * * * reasonably could be expected to cause serious damage to the national security interests of the United States." *Id.* at 19a (quoting Decl. of Att'y Gen. Ashcroft ¶ 5).

The Attorney General's public declaration explained that he could not publicly make a more detailed explanation of the basis for invoking the state secrets privilege because any such explanation would disclose the very information the privilege is designed to protect. C.A. App. 56. The Attorney General therefore referred the district court to the classified declarations and explained that the information at issue was properly classified un-

der Section 1.3 of Executive Order No. 12,958, 3 C.F.R. 333 (1996). See Pet. App. 6a, 16a-17a; C.A. App. 56. The Attorney General later reaffirmed the classified nature of the information, and formally reasserted the privilege, in a second public declaration. See *id.* at 169-171.

In conjunction with the Attorney General's assertion of the privilege, the government moved to dismiss on the ground that the case could not be litigated without disclosing privileged information, which reasonably could be expected to cause serious harm to national security. The government explained that the privileged information was central to both petitioner's allegations and the government's defenses. See Gov't C.A. Br. 14-15.

2. After full briefing on the motion to dismiss, and after reviewing the classified materials in camera and ex parte, the district court ordered the government to produce another classified declaration explaining "why 'sensitive information [cannot] be disentangled from nonsensitive information,'" and "why the plaintiff is unable to proceed with her claims and why the government cannot defend against those claims without revealing classified information." Pet. App. 35a (quoting *Ellsberg* v. *Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983), cert. denied, 465 U.S. 1038 (1984)) (brackets in original). After the government produced that affidavit, the court upheld the Attorney General's assertion of the privilege and dismissed the complaint. *Id.* at 5a-33a.

The district court found that the Attorney General had properly invoked the state secrets privilege and that the classified declarations demonstrated "the 'reasonable danger' that revelation of classified information would have on both 'intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments.'" Pet. App. 22a (quoting *Ellsberg*,

709 F.2d at 57) (footnotes omitted). The court was "unable publicly to explain [its] conclusion in any more detail," however, because, in light of the classified nature of the privileged information, "[i]t is one of the unfortunate features of this area of the law that open discussion of how the general principles apply to particular facts is impossible." *Id.* at 23a (quoting *Ellsberg*, 709 F.2d at 59 n.41).

The court then considered whether dismissal was necessary. It explained that dismissal is appropriate if the plaintiff is unable to prove a prima facie case or the defendant is deprived of a valid defense due to the exclusion of the privileged evidence, or if the very subject matter of the suit is a state secret. Pet. App. 25a-26a. "Upon conducting a thorough review of the several classified declarations," the court concluded that "the plaintiff is not only unable to prove the prima facie elements of each of her claims without the disclosure of privileged information, but * * * the defendants are unable to assert valid defenses to her claims without such disclosures." *Id.* at 27a.

The court explained in detail why the litigation of each of petitioner's claims would require the disclosure of classified, privileged information by both petitioner and respondents. The court determined that the factors governing petitioner's First Amendment retaliation claim include "whether the plaintiff's speech during the course of her employment was on a matter of public concern, whether a balancing could be undertaken of the government's interest versus the plaintiff's interest in disclosure of this information, whether the plaintiff's speech was the motivating fact for her termination, or whether there were other reasons for her termination." Pet. App. 28a. "[A]ny effort by the plaintiff to establish

these elements or by the defendants to rebut them would risk disclosure of privileged information," the court explained, because "not only is the nature of the plaintiff's employment the subject of the state secrets privilege, but so are the events surrounding her termination." *Ibid.*

Because petitioner's due process claim is based on allegations that defamatory statements were made by respondents, the court concluded that litigating that claim would require petitioner "to refute the allegations made about her." Pet. App. 29a-30a. Petitioner could not do so without revealing privileged information, however, because litigating the truth of those allegations would "necessarily implicate the classified nature of plaintiff's duties with the FBI and the substance of what happened in the underlying dispute." *Id.* at 30a (quoting Resp. Mem. 13).

The court next considered petitioner's Privacy Act claim, which would require her to prove an egregious and unlawful disclosure of information in a system of records pertaining to her job. Pet. App. 30a-31a. Because "documents related to the plaintiff's employment, termination and security review that comprise the system of records are privileged, and because the plaintiff would be unable to depose witnesses whose identities are privileged or to otherwise identify through discovery the individual or individuals who purportedly released the privileged information," the court concluded that petitioner is "unable to proceed with her Privacy Act claims." *Id.* at 31a.

Finally, the court determined that the privileged information could not be separated from the non-privileged information in such a way as to allow the case to proceed, and that there was no alternative to dismissal

that would protect the national security interests of the United States. Pet. App. 32a & n.7. Thus, although it acknowledged that dismissal is "a drastic remedy," *id.* at 31a (quoting *In re United States*, 872 F.2d 472, 477 (D.C. Cir.), cert. dismissed, 493 U.S. 960 (1989)), the court concluded that "the plaintiff's case must be dismissed, albeit with great consternation, in the interests of national security," *id.* at 32a-33a.

3. Petitioner appealed. The court of appeals informed the parties one day before oral argument that only counsel of record would be permitted in the courtroom during argument. Various news organizations moved to intervene and challenged the D.C. Circuit's decision to close the argument. In a brief unpublished order, the court of appeals granted the motions to intervene but denied the requests to open the argument to the public. Pet. App. 3a-4a. Neither petitioner nor the intervenor news organizations sought review of that order from this Court before argument was held.

After hearing argument concerning unclassified matters from counsel of record for both sides, the court of appeals closed the courtroom to all but government counsel and proceeded to inquire about the classified portions of the record. Shortly after the argument, the D.C. Circuit released a transcript of the unclassified portion of the argument.

In an unpublished per curiam judgment, the court of appeals affirmed the judgment of the district court "for the reasons given in that court's opinion." Pet. App. 1a-2a.

ARGUMENT

The court of appeals' unpublished judgment is correct and does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Petitioner does not dispute that the Attorney General properly invoked the state secrets privilege and that the privilege prevents the discovery of classified information and requires the exclusion of such information from the case. Nor could she. "The state secrets privilege is a common law evidentiary rule that allows the government to withhold information from discovery when disclosure would be inimical to national security." *Zuckerbraun* v. *General Dynamics Corp.*, 935 F.2d 544, 546 (5th Cir. 1991); see *United States* v. *Reynolds*, 345 U.S. 1, 6-7 (1953). As this Court has explained, the privilege may be invoked by "the head of the department which has control over the matter, after actual personal consideration by that officer." *Id.* at 8 (footnote omitted). Where there is a "reasonable danger" that disclosure of the information would expose state secrets that, "in the interest of national security, should not be divulged," the privilege applies and is absolute. *Id.* at 10. "[E]ven the most compelling necessity cannot overcome the claim of privilege" if state secrets are at stake. *Id.* at 11.

The Attorney General properly invoked the state secrets privilege after personally considering the matter. Pet. App. 16a-24a. The district court carefully reviewed the classified declarations, and requested an additional declaration, before satisfying itself that "the invocation of the state secrets privilege is proper." *Id.* at 22a-23a. The court of appeals likewise questioned

government counsel about the classified materials at oral argument. The classified declarations, which are part of the record in the court of appeals,[1] amply support the lower courts' conclusion that the state secrets privilege applies in this case. Petitioner does not appear to seek further review of that fact-bound determination.

2. Instead, petitioner argues (Pet. 18-26) that the district court should not have dismissed this case, but instead should have permitted non-privileged discovery.

a. It is common ground that in some cases the state secrets privilege does not require dismissal because a case may be able to proceed based solely on non-privileged evidence. In *Reynolds*, for example, this Court remanded for further proceedings after upholding the government's invocation of the state secrets privilege because it appeared that the plaintiffs could "adduce the essential facts as to [the elements of their claims] without resort to material touching upon military secrets." 345 U.S. at 11.

In other cases, however, the privileged information is so central to the disputed issues that the case cannot proceed without it. The courts of appeals have uniformly recognized that dismissal is appropriate if the exclusion of the privileged evidence would prevent the plaintiff from establishing a prima facie case or prevent a defendant from establishing a valid defense. See, *e.g.*, *Zuckerbraun*, 935 F.2d at 547; *In re United States*, 872 F.2d 472, 476 (D.C. Cir.), cert. dismissed, 493 U.S. 960 (1989); *Kasza* v. *Browner*, 133 F.3d 1159, 1166 (9th Cir.), cert. denied, 525 U.S. 967 (1998). Dismissal is also appropriate when the very subject of the suit is a state

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[1] The government also could furnish a copy of those declarations directly to the Court in connection with its consideration of the petition.

secret. See, *e.g.*, *Kasza*, 133 F.3d at 1166; *McDonnell Douglas Corp.* v. *United States*, 323 F.3d 1006, 1021 (Fed. Cir. 2003).

Petitioner conceded below that dismissal is appropriate in those circumstances. See Pet. C.A. Br. 17, 22. The district court correctly determined that dismissal is appropriate in this case because "the plaintiff is not only unable to prove the prima facie elements of each of her claims without the disclosure of privileged information, but * * * the defendants are unable to assert valid defenses to her claims without such disclosure," Pet. App. 27a. The classified materials show that the district court's conclusion is correct and that any prior disclosures in the media or elsewhere did not contradict the Attorney General's assertion that further disclosure would harm national security. See *id.* at 23a-24a. As the district court recognized, however, a detailed explanation of those points cannot be made publicly because doing so would "forc[e] a disclosure of the very thing the privilege is designed to protect." *Reynolds*, 345 U.S. at 8; see Pet. App. 22a-23a. The court of appeals' unpublished order affirming the district court's application of settled legal principles to the facts of this case does not warrant further review.[2]

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[2] Petitioner repeatedly refers (Pet. 8-9, 24-25) to a report of the Department of Justice Office of Inspector General (OIG). But that report, which recognized the sensitivity of the information at issue here, is consistent with the assertion of the privilege and dismissal of this suit. Although the OIG released a 35-page unclassified summary of its classified report, the full classified report is much longer and has not been released to the public. See OIG, *A Review of the FBI's Actions in Connection with Allegations Raised By Contract Linguist Sibel Edmonds—Unclassified Summary* 2-3 (Jan. 2005). The unclassified summary explains that it "does not include all of the facts in the full report" and is sometimes "difficult to understand * * * because much

b. Although petitioner contends (Pet. 18-20) that the courts of appeals are divided on the proper procedures a court should follow in determining whether to dismiss a case, there is no such conflict, and the district court afforded ample procedural protections to petitioner.

i. Petitioner contends primarily (Pet. 18, 19) that "courts have disagreed about whether the state secrets privilege ever justifies dismissal at the pleading stage," or whether courts should instead "first allow[] non-privileged discovery" before dismissing. But petitioner cites no case in which any court of appeals has ever held that dismissal is *never* appropriate at the pleading stage. Nor, conversely, has petitioner cited any case in which a court of appeals has held that dismissal is *always* appropriate at the pleading stage.

Instead, the courts that have dismissed cases have done so because it would not have been possible to litigate the cases without revealing privileged information, without regard to whether the cases were then at the pleading or a later stage of the litigation.[3] In contrast,

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of the information from the full report remains classified and cannot be included." *Id.* at 3 n.1. Because the information in the public record is necessarily incomplete, it does not support the disclosure of extensive classified details, the release of which would cause serious harm to national security.

[3] See *Zuckerbraun*, 935 F.2d at 547-548; *Bareford* v. *General Dynamics Corp.*, 973 F.2d 1138, 1142, 1144 (5th Cir. 1992), cert. denied, 507 U.S. 1029 (1993); *Tenenbaum* v. *Simonini*, 372 F.3d 776, 777 (6th Cir.), cert. denied, 125 S. Ct. 605 (2004); *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc); *Black* v. *United States*, 62 F.3d 1115, 1119 (8th Cir. 1995), cert. denied, 517 U.S. 1154 (1996); *Bowles* v. *United States*, 950 F.2d 154, 156 (4th Cir. 1991); *Fitzgerald* v. *Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1243-1244 (4th Cir. 1985); *Kasza*, 133 F.3d at 1170; *Molerio* v. *FBI*, 749 F.2d 815, 822-826 (D.C. Cir. 1984); *McDonnell Douglas*, 323 F.3d at 1022.

the courts that have not dismissed at the pleading stage or some later stage have emphasized that it was possible that the cases *could* be litigated to final judgment without disclosing privileged information.[4] All of the courts of appeals have applied the same legal standard—whether the case could be litigated without disclosing privileged information—and have based their decisions on the facts of each case. In *Ellsberg* v. *Mitchell*, 709 F.2d 51 (D.C. Cir. 1983), cert. denied, 465 U.S. 1038 (1984), for example, the D.C. Circuit affirmed the dismissal of claims as to which the plaintiff could not "make out a *prima facie* case without the [privileged] information," but reversed the dismissal of other claims as to which the plaintiff might have been able to do so. *Id.* at 65, 68. The erroneousness of petitioner's assertion of a circuit split is further underscored by the fact that she puts some circuits on *both* sides of the supposed circuit split, when in reality the cited decisions applied the same legal standards to different facts in a consistent manner.[5]

Nor would a categorical rule precluding dismissal at the current stage make sense. As the privileged facts of

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[4] See *In re United States*, 872 F.2d at 478-479; *DTM Research, L.L.C.* v. *AT&T*, 245 F.3d 327, 333-334 (4th Cir. 2001); *Monarch Assurance P.L.C.* v. *United States*, 244 F.3d 1356, 1364-1365 (Fed. Cir. 2001); *Clift* v. *United States*, 597 F.2d 826, 830 (2d Cir. 1979); *Heine* v. *Raus*, 399 F.2d 785, 791 (4th Cir. 1968).

[5] See *DTM Research*, 245 F.3d at 334 (Fourth Circuit decision remanding for further proceedings while explaining the consistency of that result with other Fourth Circuit cases, including *Farnsworth Cannon*, *supra*, which petitioner places on the other side of the supposed circuit split, see Pet. 19); *Molerio*, *supra* (D.C. Circuit decision affirming dismissal while following and distinguishing on its facts that circuit's decision in *Ellsberg*, *supra*, which petitioner places on the other side of the supposed circuit split, see Pet. 20).

this case demonstrate, it is clear at the outset of some cases that litigation cannot proceed without disclosing privileged information. In such cases, subjecting the parties to non-privileged discovery would be pointless, and would serve only to subject the parties to unnecessary effort and expense while risking the disclosure of sensitive information. Just as in any other context, cases should be dismissed when further non-privileged factual development could not alter the result. Cf. Fed. R. Civ. P. 56(c) (summary judgment is appropriate when there is no genuine dispute of *material* fact).

Although petitioner relies heavily (Pet. 14, 17-18, 23) on *Totten* v. *United States*, 92 U.S. 105 (1876), that case does not support her position. *Totten* articulated the "longstanding rule * * * prohibiting suits against the Government based on covert espionage agreements." *Tenet* v. *Doe*, 125 S. Ct. 1230, 1233 (2005). This Court took great care in *Tenet* to distinguish the state secrets privilege from *Totten*'s "broader holding that lawsuits premised on alleged espionage agreements are altogether forbidden." *Id.* at 1236; see *id.* at 1237 (rejecting the view that "the *Totten* bar has been reduced to an example of the state secrets privilege"). Petitioner appears to assume (see Pet. 23) that because a *Totten* case *must* be dismissed at the pleading stage, state secrets cases may *never* be dismissed at that stage. But there is no basis for that assumption. If anything, *Totten* supports dismissal here to the extent that it stands for the proposition that a case should be dismissed if it cannot be litigated without disclosing classified information. See *Totten*, 92 U.S. at 107.

ii. The other conflicts alleged by petitioner are both illusory and irrelevant. Although petitioner contends (Pet. 21) that the circuits are divided on "whether a

judge is obligated to examine the allegedly privileged material," this Court already held in *Reynolds* that whether a judge must analyze the actual privileged material depends upon the individualized circumstances of each case. 345 U.S. at 10-11. The cases cited by petitioner (Pet. 21) are not to the contrary. See *Ellsberg*, 709 F.2d at 59 n.37 (stating that "*in camera* review of the material is * * * obligatory" where, unlike here, "a litigant must lose if the claim is upheld *and the government's assertions are dubious*") (emphasis added); *ACLU* v. *Brown*, 619 F.2d 1170, 1173 (7th Cir. 1980) (en banc) (stating that in camera review of documents is "often" required, but not describing the circumstances under which such review is in fact required).

In any event, the question whether a court must examine allegedly privileged material is not presented by this case. The district court carefully reviewed classified declarations that described the privileged information. In the court of appeals, petitioner never argued that the district court should have undertaken further review of the classified information, and instead recognized that "the court apparently considered defendants' secret evidence in detail." Pet. C.A. Br. 26-27. Because the issue was neither pressed nor passed upon below, further review is unwarranted. See, *e.g.*, *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

iii. The final alleged circuit split relates to whether a court should consider alternatives to dismissal. Pet. 21. There is no such circuit split because no court of appeals has refused to consider alternatives. Although petitioner contends that alternatives were not expressly considered in *Farnsworth Cannon* and *Tenenbaum*, both of those decisions expressly concluded that further litigation would inevitably lead to the disclosure of state

secrets, which necessarily means that effective alternatives to dismissal were not available. See *Farnsworth Cannon*, 635 F.2d at 281; *Tenenbaum*, 372 F.3d at 777. Neither decision ruled out the use of alternatives in appropriate cases.

In any event, the district court in this case *agreed* with petitioner that alternatives to dismissal should be considered, and determined that "there are no viable alternatives" in the circumstances of this case. Pet. App. 32a n.7. Thus, even if there were a circuit split on the issue, it would not be implicated by this case.

c. Although petitioner contends (Pet. 22) that urgent guidance is needed because "the government's use of the privilege is on the rise," her statistics indicate that the state secrets privilege has been litigated on average only twice a year during the past quarter-century, both before and after the events of September 11, 2001. See *ibid.* This Court already articulated the overarching legal principles in *Reynolds*, *supra*, and the courts of appeals have applied the privilege in a consistent and practical manner ever since, as explained above. Further guidance on the state secrets privilege does not appear to be needed, either in general or on the specific procedural issues raised by petitioner.

3. Petitioner's request (Pet. 26-29) for review of the court of appeals' decision to close the courtroom to members of the public comes too late. The argument has already been held, the public has already been excluded from the courtroom, and no action by this Court could alter those facts. Before the argument was held, petitioner and members of the media sought reconsideration of the court of appeals' decision to close the courtroom, but that court denied their motions and no one sought review from this Court before the argument was held.

Even now the intervening members of the media have not sought further review.

There is no ongoing injury from the court of appeals' precautionary closing of the courtroom because that court released a transcript of the argument shortly after it was held. Petitioner has identified no further remedy this Court could order.

Nor does this case satisfy the "capable of repetition yet evading review" exception to the mootness doctrine. That exception "applies only in exceptional situations where the following two circumstances [are] simultaneously present: (1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." *Spencer* v. *Kemna*, 523 U.S. 1, 17 (1998) (internal quotations and citations omitted). Neither circumstance is satisfied here. The issue can be fully litigated, as demonstrated by the cases cited by petitioner in which the issue was fully litigated. See Pet. 26-28. And there is no reason to expect that petitioner herself will be subject to the same action again.

Even if the issue were not moot, the court of appeals' cursory, unpublished order would not warrant further review. Petitioner does not appear to allege a conflict between that order and any decision of another court of appeals regarding whether the courtroom should have been closed under the circumstances of this case. The court of appeals' order lacks precedential significance in any event because it does not articulate any legal standards that could be applied to other cases. Cf. D.C. Cir. Rule 36(c)(2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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